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THE EFFECT OF PUBLIC LAND ORDER 82 ON THE OWNERSHIP OF COASTAL SUBMERGED LANDS IN NORTHERN ALASKA*

M-36911

December 12, 1978

Withdrawals and Reservations: Effect of

Public Land Order 82, issued in 1943, which withdrew from "sale, location, selection and entry" certain described "public lands" in the Territory of Alaska, could include coastal and inland submerged lands, if such were the intent of the Order.

Withdrawals and Reservations: Effect of

Where the language of a withdrawal Order is unclear as to whether submerged lands were included in the Order which withdrew certain lands in the Territory of Alaska from "sale, location, or entry," the withdrawal should be construed to carry out its intent and purpose.

Withdrawals and Reservations: Effect of

Where the description in the withdrawal Order affecting lands in the Territory of Alaska is ambiguous, but can be interpreted to exclude coastal submerged lands, and where other evidence exists which tends to indicate that coastal submerged lands were not intended to be included in the Order, the Order will be construed to exclude coastal submerged lands.

Withdrawals and Reservations: Effect of

Where evidence exists that a withdrawal of certain lands in the Territory of Alaska intended to include inland submerged lands, and such submerged lands are not specifically excepted from the withdrawal, the withdrawal will be construed to include inland submerged lands.

Withdrawals and Reservations: Effect of—Submerged Lands Act: Generally

Where submerged lands were included in a withdrawal Order in Alaska, which was in effect at the time the State entered the Union, even though such submerged lands were not specifically described in the withdrawal Order, such submerged lands would not pass to the State at Statehood pursuant to sec. 5(a) of the Submerged Lands Act.

Withdrawals and Reservations: Effect of—Submerged Lands Act: Generally

The subsequent revocation of a withdrawal of submerged lands which prevented the State from acquiring title to such lands at Statehood pursuant to sec. 5(a) of the Submerged Lands Act, has no effect on the ownership of the lands contained in the withdrawal.

Withdrawals and Reservations: Effect of—Submerged Lands Act: Generally

Where the coastal submerged lands in the Arctic National Wildlife Refuge were segregated by an application for a withdrawal filed by the Fish and Wildlife Service in January 1958, one year before Alaska statehood, such application operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

This Opinion overrules Opinion of Deputy Solicitor, Aug. 21, 1959, M-36562.

*Not in Chronological Order.

OPINION BY OFFICE OF THE SOLICITOR

To: Secretary

From: Solicitor

Subject: The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska

I. INTRODUCTION AND SUMMARY

This memorandum discusses the impact of Public Land Order 82 (Jan. 22, 1943), published in 8 FR 1599 (Feb. 4, 1943) (hereafter PLO 82), on the current ownership of (1) offshore submerged lands [1] and (2) inland submerged lands [2] in northern Alaska.

Current ownership depends on (1) whether PLO 82 withdrew lands in either category; (2) if so, whether this withdrawal effectively prevented transfer of federal ownership to the State of Alaska upon statehood [3]; and (3) if so, whether revocation of PLO 82 in 1960 vested ownership of the lands in the State. This memorandum considers these questions in order.

The question of the impact of PLO 82 is of substantial importance. The mineral wealth—especially oil and gas—of the coastal submerged lands is thought and to some extent known to be considerable. On the assumption that it has title to at least some of these lands, the State of Alaska has leased some of the reserves, notably in Prudhoe Bay and its environs, to private energy companies for development. If the Federal Government owns these lands, then these leases are *ultra vires* State action, and consequently without effect to the extent inconsistent with federal ownership.

The basic issue of the extent of the withdrawal made by PLO 82 and its effect on State ownership has been acknowledged inside the Department of the Interior for several years.[4] The issue involving

[1] "Offshore submerged lands" as discussed in this opinion refers to those submerged lands underlying the waters of the Arctic Ocean off northern Alaska, including the lands underlying the bays and capes below the mean high tide line on the actual or physical, as opposed to constructive or legal, coastline.

[2] The only inland submerged lands in issue here are those underlying navigable waters. There is no question that the beds of nonnavigable waters remained in United States' ownership at the time of statehood. *See* Davis, ***State Ownership of Beds of Inland Waters—A Summary and Reexamination,*** **57 Neb. L. Rev. 665–66 (1978).**

[3] The Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315 (1970), exempted certain categories of lands from the general grant it made of lands to the states. The Submerged Lands Act applies to Alaska pursuant to the Alaska Statehood Act, July 7, 1958, Pub. L. No. 85–508, 72 Stat. 339, 48 U.S.C. note preceding § 21. This issue is discussed at pp. 170–172, below. Alaska was admitted to the Union on Jan. 3. 1959, Proc. No. 3269, 24 FR 81.

[4] The matter first surfaced in the context of whether the State's selection of lands in the bed of the Colville River (which is within the area withdrawn) should be charged against the State's entitlement under the Statehood Act. The Bureau of Land Management (BLM) in fact did so. The question was also discussed internally in the Department in connection with a dispute between the Department and the State concerning the coastal boundary of the Naval Petroleum Reserve No. 4.

Since PLO 82 was revoked, the State of Alaska has made selections under the Alaska Statehood Act of submerged lands underlying the bed of the Sagavanirktok River, near its mouth where it is generally conceded to be navigable. On the other hand, the State has not selected submerged lands under the waters of Prudhoe Bay, apparently on the rationale

coastal submerged lands has been raised in connection with a proposed sale of oil and gas resources in submerged lands in the Beaufort Sea off northern Alaska, which would be a joint sale conducted by the Department and the State. The need to clarify the status of the ownership in connection with this proposed joint sale has been the catalyst which has prompted this opinion.

Based on the following discussion, I have concluded that the coastal submerged lands were not withdrawn by PLO 82. Consequently, the lands passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act and the Alaska Statehood Act, with the exceptions noted below. I have also determined that, in contrast to the coastal submerged lands, the inland submerged lands were withdrawn by PLO 82, did not pass to the State of Alaska at statehood, and remain in federal ownership despite the revocation of PLO 82 in 1960, except where the State of Alaska has selected the submerged lands in question and the Federal Government has approved these selections.[5] Offshore submerged lands which did not pass to the State upon statehood are those submerged lands reserved by Executive Order 3797–A dated Feb. 23, 1923, with regard to the Petroleum Reserve No. 4, and those submerged lands segregated by the Bureau of Sport Fisheries and Wildlife Application dated Jan. 14, 1958, with regard to the Arctic National Wildlife Range.

II. THE MEANING OF PLO 82

On Jan. 22, 1943, Acting Secretary of the Interior Fortas issued PLO 82. (A copy is attached as Exhibit A.) It withdrew from "sale, location, selection, and entry" certain described "public lands" in the Territory of Alaska, and also "reserved" the minerals in these lands. The Order was made subject only to "valid existing rights."

The Order reads in relevant part, as follows:

F.N.4—Continued
that title to that submerged land passed to it at statehood by operation of the Submerged Lands Act.

The question of PLO 82's effect on submerged lands under inland navigable waters is also currently pending before the Department's Alaska Native Claims Appeal Board (ANCAB), in connection with the State's challenge of a Departmental conveyance of certain lands in the bed of the Colville River to the Kuugpik Village Corp. under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (Supp. V, 1975) (ANCSA). The Department argues that the land was properly conveyed because PLO 82 effectively reserved it to federal ownership upon statehood. Alaska, however, claims that PLO 82 did not validly reserve title to such lands and, therefore, they passed to the State at statehood. (*Appeal of Alaska*, ANCAB #VLS 78–32) (This position appears inconsistent with the State's selection of lands underlying inland navigable waters, because there is obviously no need to select what is already in State ownership.)

[5] Because these lands are north of the so-called "PYK" line, the President must approve these selections before they are effective. *See* § 6(b) of the Alaska Statehood Act; 48 U.S.C. Note preceding § 21.

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following described areas are hereby withdrawn from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war:

NORTHERN ALASKA

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of Firth River, approximately latitude 68 degrees 52'N., longitude 141 degrees 00'W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

The area described, including both public and nonpublic lands, aggregates 48,800,000 acres.

* * * * *

This order shall not affect or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the above-described lands under the public land laws, including the mining laws, and the leasing of the lands under the mineral-leasing laws.

A. Meaning of "Public Lands" in Alaska

PLO 82 expressly withdrew "all public lands * * * in the following described area * * *." The geographical extent of PLO 82 should be governed by the contemporaneous intent of the Department in withdrawing and reserving "public lands". *See*, *Udall* v. *Oelschlaeger*, 389 F. 2d 974 (D.C. Cir. 1968); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949). Because PLO 82 itself expressly withdrew only *public lands* and the minerals in those lands, we must consider whether this term was intended to limit, or in fact limited, the effect of the order to the uplands.

1. Status of Submerged Lands Prior to PLO 82 in 1943

Historically under the common law, submerged lands have been treated differently from uplands. As successors to the English Crown, the thirteen original states acquired title to the beds of navigable rivers. *Martin* v. *Waddell*, 41 U.S. 367 (1842). In federal territories, however, the United States held title to such lands in its capacity as territorial sovereign. *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Once the state entered the Union, title to lands beneath navigable waters was held to vest in the state. *Shively* v. *Bowlby*, 152 U.S. 1, 49–50 (1894). Thus, lands beneath navigable waters in states were not subject to grants by the United States. *Barney* v. *Keokuk*, 94 U.S. 324 (1876).

In *Shively*, which concerned a private party's claim that he had been granted a portion of the bed of the (navigable) Columbia River by the United States while the area

was a territory, the Court acknowledged that the United States had the constitutional authority to make such grants of land beneath navigable waters to private persons while the area was in territorial status:

> By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.[8]

Concerning the precise point at issue here, the validity of a *retention* of submerged lands underlying inland navigable waters for a federal reservation, as against the claims of a subsequently created state, was specifically recognized in *Montana Power Co.* v. *Rochester*, 127 F. 2d 189 (9th Cir. 1942). Citing *Shively*, the court stated that

> [c]learly, the United States in the exercise of its sovereign power had the right to deal with the lands below high water mark as it saw fit, * * * and the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region.

Id. at 191. The case of *United States* v. *Holt State Bank*, 270 U.S. 49 (1926) is not inconsistent with this. There the Supreme Court held that there was no intention on the part of the United States to reserve the bed of a navigable lake in a territory for the benefit of the Chippewa Indians; therefore, the bed of the lake passed to the state upon statehood. See 270 U.S. at 58.

Thus, it was well settled that the submerged land during the territorial period was property of the United States, subject to retention or disposal by Congress. U.S. Const., Art. IV., Sec. 3, Cl. 2.

2. *Effect of Withdrawals of Public Lands in Alaska on Submerged Lands Prior to PLO 82 in 1943*

Although Congress had not, up to the time of PLO 82, enacted *general* legislation which treated submerged lands as public lands,[8a]

[8] *Ibid.* See also *Goodtitle* v. *Kibbe*, 9 How. 471, 478 (1849). The Court in *Shively* went on, however, to observe that the United States had never undertaken "by general laws" to *dispose* of such lands to private parties. 152 U.S. at 48–50, 58. *Shively* represented a departure from earlier decisions of the Supreme Court which had suggested that the United States had no power to grant away these tidelands to individuals during the territorial period prior to admission of a state. *See* 152 U.S. at 47. Once the Court made clear in *Shively* that Congress had the power to make grants of these lands during the territorial period, claimants were quick to seize upon the provisions of the general land laws as congressional authority for their tidelands claims. Such claims were rejected in *Mann* v. *Tacoma Land Co.*, 153 U.S. 273 (1894); *Morris* v. *U.S.*, 174 U.S. 196 (1899); *Scott* v. *Carew*, 196 U.S. 100 (1905); *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935).

[8a] Congress had, of course, enacted the Mineral Leasing Act in 1920. At the time PLO 82 was issued, it had not been finally determined by the Department or the courts whether this authorized the issuance of leases for submerged lands. *See* p. 159, *infra*. The Department had in fact issued permits for coastal submerged lands under this Act. *See* p. 167, *infra*.

we must examine whether public lands in Alaska had ever included submerged lands. There are two items of relevance here. The first is a 1918 Supreme Court decision which, in *dictum* and general approach, might be construed as suggesting that "public lands" include submerged lands. The second, and more precisely in point, is the 1937 Solicitor's Opinion which concluded (citing that earlier Supreme Court decision) that water and submerged lands might be reserved in Alaska under a statute authorizing the reservation of "public lands" for Indians or Eskimos. These will be discussed in turn.

In 1918, twenty-five years before PLO 82, the Supreme Court considered whether an Act of Congress setting aside "the body of *lands* known as Annette Islands" (*Italics added*) in Alaska included the *waters* overlying coastal submerged lands. The Congressional withdrawal had been for the benefit of the Metlakatla Indians who were peculiarly dependent on the fisheries in the adjacent waters of the Pacific Ocean. Subsequently an extensive fishtrap, designed to catch about 600,000 salmon, was erected by Alaska Pacific Fisheries, a California corporation, in the navigable waters off the coast of the islands. The question before the Court was whether Congress intended to embrace only the uplands of the islands or whether it intended also to include adjacent waters (over the coastal submerged lands) for the Indians. Concerning the authority of the United States to deal with these waters, the Court noted (referring, in *dictum*, to adjacent submerged land as well as waters):

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority.

248 U.S. at 87. Looking to Congressional intent, the Court found that a major purpose of the Act was to make the Metlakatlans self-sustaining. Finding that the Indians could not sustain themselves from the use of the uplands alone, the Court found that the Congress intended "the body of lands known as Annette Islands" to include the surrounding waters. *Alaska Pacific Fisheries* v. *U.S.*, 248 U.S. 78, 89 (1918).

Although the key question was the intent of Congress in making the designation of a "body of lands," and the Court's holding went only to adjacent waters, *Alaska Pacific Fisheries* could be construed as containing a suggestion to the drafters of PLO 82 that they had authority to include coastal submerged lands in the "public lands" of northern Alaska being withdrawn by PLO 82 to prevent interference with federal oil and gas exploration and development.

Nineteen years later, the Department's Solicitor issued an opinion on the authority of the Secretary to

"reserve waters in connection with, and independently of, land reservations for Alaskan Natives under the Act of May 1, 1936." 56 I.D. 110 (1937). The 1936 Act had extended the Indian Reorganization Act to Alaska, and authorized the Secretary to reserve, among other things, "public lands" adjacent to lands previously reserved for Indians or Eskimos, or other "public lands" actually occupied by Indians or Eskimos.

The Solicitor, whose opinion was approved by the Secretary, decided that the Act authorized the reservation of water adjacent to any lands already reserved or being reserved for the Natives. The opinion cited the decision of the Supreme Court in *Alaska Pacific Fisheries*, and observed:

> The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition.[7]

This decision, coming six years before PLO 82, provides reasonably direct support on which the drafters of PLO 82 could have relied in reserving both the inland and the coastal submerged lands in northern Alaska as "public lands."

[7] 56 I.D. at 114. The Solicitor cited *Alaska Pacific Fisheries* and *Shively* v. *Bowlby* for this proposition.

3. Summary of Status of "Public Lands" as Including Coastal and Inland Submerged Lands in 1943

The above discussion shows that the courts have long recognized an inherent sovereign power of the United States over land in territories, including submerged lands. A published Solicitor's opinion had concluded that "public lands" in Alaska did, in the specific circumstances studied, include submerged lands and the waters over those lands.

The common Departmental understanding in 1943 regarding Alaska is what we must assess, and it was entirely possible for the drafters of PLO 82 to assume that "public lands" included coastal submerged lands and submerged lands under inland navigable waters, especially if that construction would have furthered the purpose of the withdrawal. The purpose of the withdrawal is discussed below at pp. 164–169.

4. Summary of Events Relating to the Issue After 1943

Judicial decisions and Congressional action after 1943 obviously could not have affected what was intended to be withdrawn by PLO 82 in 1943. Yet as these subsequent actions interpret the limitations posed by the use of the term "public lands," these actions are relevant to the power of the Secretary to in-

clude submerged lands as "public lands," and I will discuss them briefly.

In *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), the Court was concerned with the Secretary's designation of an Indian reservation for the use and benefit of the native inhabitants of Karluk, Alaska. The reservation included certain lands and "waters adjacent thereto extending 3,000 feet from the shore line." The 1936 statute under which the reservation was made authorized the Secretary of the Interior to designate as an Indian reservation and to add "additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory." [8]

The Supreme Court found that the Secretary was acting under sec. 2 of the Act of May 1, 1936 and under Executive Order 9146 in making the withdrawal. Both authorities are restricted to "public lands." *See* 337 U.S. at 101. The Court listed five reasons for deciding that the Secretary was authorized to include coastal submerged lands in the withdrawal of public lands:

> Taking into consideration the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the purpose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act, we have concluded that the Secretary of the Interior was authorized to include the waters in the reservation. No injunction therefore may be obtained because of the invalidity of Order No. 128.

337 U.S. 116

Some of these reasons were equally applicable to the withdrawal of coastal submerged lands in PLO 82. For example, the importance of possible oil resources in the submerged lands to the war effort could have been considered (see pp. 164–169, *infra*) and PLO 82 was itself a temporary reservation. And the Court cited and reaffirmed the pre-PLO 82 *Alaska Pacific Fisheries* holding (the "Annette Islands case"). Overall, this case is significant in manifesting a continuing attitude by the Supreme Court not to accord talismanic significance to the words "public lands," but instead to recognize in some instances that the term "public lands" as used in Executive Order 9146 (the legal basis for PLO 82) can include submerged lands.

Twenty-one years later, the Ninth Circuit considered the effect of Executive Order No. 8979, issued by President Roosevelt on Dec. 6, 1941, which created the Kenai National Moose Range. *U.S.* v. *Alaska*, 423 F. 2d 764 (9th Cir. 1970). The Order refers to "hereinafter-described areas of land and water of the United States," rather than to "public land." The State of Alaska argued that the withdrawal was ineffective as to navigable water of

[8] Act of May 1, 1936, 49 Stat. 1250–51. This section of the 1936 Act was the one the Solicitor had interpreted in 1937 to allow reservation of water adjacent to lands reserved for the Natives. *See* 56 I.D. 110 (1937), discussed at pp. 156–157, *supra*. The Supreme Court in fact cited the Solicitor's Opinion in its discussion. *See* 337 U.S. at 114.

the Moose Range, but the Court pointed out that failure to withdraw water or land under the water would nullify the purpose of the Order because the moose depended on the waters within the Range for their existence.[9]

The Court found the intent to withdraw both waters and lands underlying Lake Tustumena to be very plain. In reaching its conclusion, the Court observed: "In construing the pertinent Alaskan statutes, the courts have consistently held that the words 'public domain', 'public lands' and 'lands', include land under water." 423 F. 2d at 766. As noted, the Order itself refers to both "land and water of the United States." This case also makes clear that submerged lands can be withdrawn and retained in federal ownership for a governmental purpose in a context not involving the government's trust responsibility to Indians and Eskimos.

No post-1943 development has suggested that the public lands do not include the beds of *inland* navigable waters. There were, however, post-1943 developments which established the principle that Congress had not generally extended the public lands to include *coastal* submerged lands adjoining states. *See, e.g.*, 60 I.D. 26 (1947), a Solicitor's Opinion holding that the Mineral Leasing Act of 1920 does not authorize the issuance of oil and gas leases with respect to the submerged lands off the coasts of the United States. This opinion was upheld by the Court of Appeals in *Justheim* v. *McKay*, 229 F. 2d 29 (D.C. Cir. 1956), *cert. den.* 351 U.S. 933 (1956). *See also* Solicitor's Opinion M-36084 (June 25, 1951) holding that selections of coastal submerged lands under various types of land scrip must be rejected in part because "public lands" as used in the federal statutes authorizing selections based on such scrip does not include coastal submerged lands.

From this review of post-PLO 82 developments, it is apparent that the question of whether the public lands in Alaska could include inland or coastal submerged lands has continued to turn on the language and purpose of the specific withdrawal at issue. It is that language and purpose which we must now examine in more detail.

B. PLO 82's Description of the Area Withdrawn

1. Coastal Submerged Lands

The language of the Order in question does not specifically de-

[9] "Appellees would have the male and female of this semi-aquatic animal find each other and mate in dense woods and thickets, and on precipitous mountains and cliffs, rather than in or around the tranquil waters of their native habitat. President Roosevelt never intended such a result, nor did he envision the bulls and cows of this noble group standing on the shores of streams and lakes and there extending their necks to giraffelike proportions in order to enjoy the aquatic vegetation so essential to their continued existence." 423 F. 2d at 767.

scribe the northern boundary of the area withdrawn. The section is captioned simply "Northern Alaska," without stating a northern limit. The portion of the text which concerns the extent of the public lands withdrawn reads as follows:

> All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada * * * thence westerly along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the DeLong Mountains, to Cape Lisburne.

The operative part of the description says the withdrawal covers "[*a*]*ll* [the public lands[10] in] that part of Alaska lying north of [the line drawn in the order]." (Italics added.) This language is broad enough to cover the coastal submerged lands, assuming that "public lands" includes submerged lands, an issue which is discussed above in terms of legal authority (Part I.A) and which is discussed below in terms of Departmental intent (Part I.C).

The description goes on to define the southern boundary line of the withdrawal area as beginning on the Canadian border and running "thence westerly along this divide, and the periphery of the watershed northward *to* the Arctic Ocean * * * *to* Cape Lisburne." (Italics added) This language defines the southern boundary in terms of the watershed which runs northward to the Arctic; *i.e.*, the southern line is fixed at that point where water runs north rather than south. If the language were meant to limit the withdrawal to the *watershed* lying "northward *to* the Arctic Ocean." the limitation would need to come at the beginning or end of the withdrawal language to be correct gramatically, and *not* in the middle of the definition of the southern boundary.

The language "northward *to* the Arctic Ocean" appears to be used only in the context of defining the southern boundary line. It is possible, however, to conclude that the language in fact described the intended northern boundary as well (at the shoreline of the Arctic Ocean) even though such a construction would be grammatically incorrect. It is worthy of note that the language is the *only* reference in the order that potentially fixes a northern boundary, other than the boundary of U.S. ownership under international law.[11]

The western end of the southern boundary is described as "*to* Cape Lisburne" (italics added). Cape Lisburne ends by definition at water's edge. This language might suggest that the withdrawal did not extend beyond land's end and that

[10] This part of the Order merely refers to all that part of northern Alaska; however, the beginning of the Order states that it withdraws "all public lands * * * in the following described areas. * * *"

[11] The entire federal ownership as of 1943 was somewhat unclear. The United States had historically claimed ownership to at least three miles offshore. It was not until the Truman declaration in 1945 that the United States formally asserted jurisdiction and control over the entire Continental Shelf. *See* Exec. Proc. 2667, Sept. 28, 1945, 10 F.R. 12303; *see also United States* v. *Calif.*, 332 U.S. 19 at 33–34 (1947).

coastal submerged lands were not included. But Cape Lisburne is the western, not the northern boundary, and it is the northern boundary which is in question. Because the coastline extends directly south and east from Cape Lisburne, and because the Order withdrew "all that part of Alaska" extending north of the line which terminates at Cape Lisburne, there is not necessarily a gap between Cape Lisburne and the boundary of the coastal submerged lands. From Cape Lisburne, in other words, the boundary of the coastal submerged lands extends due north.

Other parts of PLO 82 withdrew public lands on the Alaska Peninsula and in the Katalla-Yakataga area. Regarding the Alaska Peninsula withdrawal, the Order describes the marine boundary, in pertinent part, as "*along* the Pacific Ocean * * * *along* the south shore of Tuxedni Bay [and] *along* * * * the shores of Kuichak Bay and Bristol Bay * * *." (Italics added.)

The description of the Katalla-Yakataga area reads, in pertinent part: "* * * to the Gulf of Alaska * * * [and] along the Gulf of Alaska. * * *" Although this description is more ambiguous than in the case of the Alaska Peninsula because it does not expressly refer to "the shore of" the Gulf of Alaska, it does establish a limit "along the Gulf. * * *"

Express placement of the boundary along the shore and the Gulf suggests, where this expression is not used, an intention to include coastal submerged lands.

The descriptive language of PLO 82 might be construed broadly enough to include coastal submerged lands in the northern Alaska withdrawal, assuming that the term "public lands" includes coastal submerged lands. Such lands were specifically excluded in other parts of the order. But the order can be read ("northward to the Arctic Ocean") to limit the withdrawal to the coastline of the Arctic Ocean. Because the descriptive language of the area withdrawn is somewhat ambiguous, however, I must examine other evidence of the drafter's intent.

A search of the Department's files for a map and other direct evidence of the area intended to be withdrawn has not yielded conclusive results. A map indicating the three areas withdrawn was found in a Department file folder[12] which includes several PLO 82-related documents bearing dates between 1940 and 1960. It is a 1940 Map of Alaska showing the three areas withdrawn by PLO 82 in yellow. The yellow coloring does not indicate that any of the submerged lands off northern Alaska were included. The yellow coloring on this map appears to be rather imprecisely done, however.

[12] This folder was found in BLM File #1941468.

For example, coastal submerged lands underlying Icy Bay in the Katalla-Yakataga are indicated in yellow, as are most (but not all) of the submerged lands beneath lakes. The memorandum found in the same folder as the map provides no assistance in the matter, and we have been unable to determine whether that map was the one used in connection with the decision to issue PLO 82. On the other hand, the map does reflect the understanding of someone in the Department that offshore submerged lands were excluded and onshore submerged lands were generally included in the withdrawal.

In the same file, however, there is also a 1957 map showing the area withdrawn which was used in connection with a proposed modification of PLO 82. The map appears to include the northern coastal submerged lands in PLO 82. The map was prepared, of course, more than a decade after PLO 82 was issued in 1943, and does not necessarily reflect the Department's understanding of the effect of PLO 82 when it was issued.

Finally, the Department prepared and published in July 1958 a large book of existing land withdrawals and reservations in Alaska. *Alaska, Federal Withdrawals and Land Reservations.* Obviously prepared in connection with statehood deliberations (and published by the Government Printing Office in bound form the same month that Congress completed action on the Statehood Act), it shows PLO 82 as extending beyond the coastline to include coastal submerged lands.

Another piece of evidence to be considered is the 48,800,000 acre figure cited in PLO 82 for the northern Alaska withdrawal. This acreage figure includes both "public and non-public lands," and thus cannot be used by itself to determine the acreage of "public lands" which were withdrawn; however, the figure may be useful in determining whether the perimeter of PLO 82 included coastal submerged lands.

At the request of my office, the Cadastral Survey of the Bureau of Land Management recently performed the following analyses, using three different maps of Alaska: the 1940 map with yellow coloring found in the BLM file, the 1942 Geological Survey map of Alaska, and, for sake of further comparison, a 1954 Geological Survey map of Alaska (even though the 1954 map was published eleven years after PLO 82 was issued). The 1942 map was the largest and best available USGS map at the time PLO 82 was issued and is probably the most likely one to have been used in preparing PLO 82 (even though we have uncovered no evidence that it, or any other map, for that matter, was actually used).

To create the southern boundary as described in PLO 82, lines were drawn on each map connecting peaks of the Brooks Range and the De Long Mountains to Cape Lisburne. Three different northern boundaries were used: (a) the uplands to the actual coastline; (b)

the uplands to the coastline, but closing the bays along the shore to include the area in the bays with the uplands; and (c) the uplands and coastal submerged lands to three miles offshore. A Wang Digitizer then determined the included acreage between the southern boundary and the three different northern boundaries.

The derivation of the acreage figure used in PLO 82 is not known. The technology now used to make such estimates was not available in 1943. The Cadastral Survey cautions that even today, determining acreage from maps by planimetering is subject to such variables as map accuracy, scale, projection and stability, as well as planimeter accuracy and operator efficiency.

Because none of the maps used are topographical, the southern boundary had to be drawn freehand through the spot elevations and between the river headwaters referred to in PLO 82. Moreover, judgment had to be exercised in determining the coastal boundary around the fringing islands and across the capes on the northern coast. For these reasons, Cadastral Survey believes that its estimates are "probably" subject to an error of 5%.

The following table shows the results:

Area covered	Map	Acreage (millions)
Uplands [1] to actual coastline	1940	53. 7
	1942	52. 1
	1954	52. 5
Uplands [1] to coastline plus bays	1940	54. 4
	1942	52. 6
	1954	53. 3
Uplands [1] and coastal submerged lands	1940	55. 9
	1942	55. 8
	1954	56. 7

[1] The uplands includes all submerged lands, whether under navigable or non-navigable waters. Most of the thousands of water bodies in northern Alaska have not yet been determined to be navigable or not.

None of the acreage figures for any map or area measured shows a correlation with the 48,800,000 acre figure used in PLO 82. Given the difficulties in using current techniques to make such measurements, the lack of technology in 1943 to make such measurements, the lack

of large, detailed maps in 1943 of northern Alaska, and the complete absence of information about how the PLO 82 acreage figure was derived, and whether any map was used, I can only conclude that the acreage figure used in PLO 82 was an educated guess, and that current measurement techniques applied to old maps cannot measurably assist our inquiry.

In sum, although the face of PLO 82 is ambiguous regarding whether coastal submerged lands were included, and the key language of the Order ("to Cape Lisburne" and "to the Arctic Ocean") can be read either way, on balance, I believe the better interpretation is that coastal submerged lands were excluded.

2. Inland Submerged Lands

As noted in the preceding discussion, the portion of PLO 82 which describes the area withdrawn is captioned "Northern Alaska." The specific description of the extent of the area withdrawn begins with the phrase "[a]ll that part of Alaska" and then proceeds to specifically describe the southern boundary of the withdrawn area. Because of the sweeping language used to describe the area withdrawn, a strong argument exists that in order to construe PLO 82 as excluding inland submerged lands from the withdrawal, a specifically-worded exception to that effect would have to be apparent from the face of the Order.[13] Other than the Order's concession to "valid existing rights," no exceptions from the area withdrawn are stated in PLO 82. The 1940 map also provides some indirect evidence that inland submerged lands were intended to be included. There is no evidence whatsoever to the contrary.

C. Intent and Purpose of PLO 82

Public Land Orders, like Presidential and Congressional withdrawals, should be construed to carry out the intent and purpose in making the withdrawal. See, *e.g.*, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 115 (1949); *U.S.* v. *State of Alaska*, 423 F. 2d 764, 767 (9th Cir. 1970); see also *Alaska Pacific Fisheries* v. *U.S.*, 248 U.S. 78, 87 (1918). The essential inquiry was described by the Supreme Court in *Alaska Pacific Fisheries*, *supra*, regarding withdrawal of "intervening and surrounding waters as well as the uplands" for the benefit of Indians, as follows:

> As an appreciation of the circumstances in which words are used usually is conducive and at times essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be obtained.[14]

Therefore, we must analyze the intent and purpose behind PLO 82

[13] The conclusion follows from the rule of construction for federal reservations that ordinarily all lands within the metes and bounds of the reservation perimeter (including lands underlying navigable waters) are intended to be included in the reservation. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

[14] 248 U.S. 78 at 87.

to see whether there was an intent to include coastal submerged lands in the withdrawal.

PLO 82 was an administrative action taken by Acting Secretary Fortas pursuant to the Presidential delegation of power contained in Executive Order 9146.[15] Since PLO 82 was an administrative action, the contemporaneous intent of the Department of the Interior is the relevant inquiry. And being a 35-year-old administrative action, there is a fairly meager record from which to glean intent.

As its caption indicates ("Withdrawing Public Lands for Use in Connection with the Prosecution of the War"), PLO 82 was directly related to prosecution of World War II. See Exhibit B, attached, which is a Nov. 20, 1942 "Memorandum for the Secretary" from the General Land Office Commissioner. The memorandum states that exploration and development of an Alaskan oil and gas supply were needed for the war effort. As private industry had not developed an oil and gas field in Alaska under the Mineral Leasing Act, the Federal Government was considering engaging in an oil and gas exploration program in an attempt to secure a source of oil for the armed forces. In order to protect the potential exploration area from interference by private claimants and lessees, it was considered necessary to withdraw the lands for exclusive federal use. Consequently, the lands were withdrawn from sale, location, selection and entry under the public land laws (including the mining laws), and from leasing under the mineral leasing laws.

The Nov. 20, 1942 memorandum from the Commissioner of the General Land Office to the Secretary explains PLO 82 this way:

> The strategic position of Alaska with relation to the war effort has multiplied many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory. Notwithstanding the extremely favorable terms which are accorded to private oil operators under the oil and gas leasing act, both as originally approved in 1920 and as amended in 1935, there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of any immediate operations in the area by private concerns is slight.
>
> Consideration is being given to the possibility of exploration by the Government with a view to the possible discovery of a source of oil for the use of the armed forces. It is likely that any such exploration if it is undertaken, would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn from exploration by the public.
>
> This withdrawal is proposed as an effective means of reserving the land to per-

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[15] Exec. Order 9146 transferred Presidential authority to withdraw or reserve the "public lands of the United States" to the Secretary. Presidential authority at that time sprang from, among others, the Pickett Act, June 25, 1910, 36 Stat. 847 (43 U.S.C. §§ 141, 142 (1970)) and implied executive powers. *See* Op. Atty. Gen. 73 (June 4, 1941). The bounds of delegated authority that existed at the time of PLO 82 brings us back to the meaning of "public lands," as discussed above. *See also* the discussion of the Secretary's authority under Exec. Order 9146 in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101, 116, concluding that the term "public lands" in Exec. Order 9146 could include submerged lands.

mit of the perfection of the necessary arrangements and of the completion of any exploration program that may be undertaken.

The November 1942 memorandum does not specifically address itself to the coastal submerged lands. It does, however, refer to the fact that 64 oil and gas leases covering some 137,000 acres existed in the area proposed to be withdrawn, as well as 105 oil and gas lease applications covering some 84,000 acres. We have been unable to determine whether any of these leases or lease applications included any submerged lands. The memorandum also refers to the "strategic position of Alaska" and the need to develop a supply of oil and gas "within the territory." The Territory of Alaska at that time, of course, included both inland and coastal submerged lands.

The Director of the Geological Survey, in a Nov. 16, 1942 memorandum (Exhibit C, copy attached), expressed doubt about the need for the northern Alaska withdrawal:

> In response to your memorandum of November 13 to Mr. Deeds in which you propose a withdrawal from all forms of entry, but really, I understand, for the protection from exploitation of any contained oil, of three great tracts of public land in Alaska which you designate as Northern Alaska, Alaska Peninsula, and Katalla–Yakataga:
>
> Your Northern Alaska proposal constitutes an enlargement of existing Naval Petroleum Reserve No. 4. Naval Reserve No. 4 as now described includes, with a wide margin of safety, the seepages at Cape Simpson, the chief and practically the only direct evidence of the existence of the oil in this remote area. The boundaries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging Naval Reserve No. 4 and, therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

This point of view notwithstanding, Secretary Ickes decided to withdraw the three areas in question.[16] If oil and gas were believed to exist in the inland and/or coastal submerged lands and if technology existed for its development, the administrative withdrawal of submerged lands would have been desirable in 1943.

In fact, the 1923 proclamation creating Naval Reserve No. 4 did include some submerged lands. The Order begins by noting the existence of "large seepages of petroleum *along the Arctic Coast of Alaska* and conditions favorable to the occurrence of valuable petroleum fields *on the Arctic Coast*." (Italics added.) The Order included "all the public lands" not only along the coast to the highest highwater mark, but also within a line drawn along the

> ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point where such barrier reefs are not over three miles off shore, except in the case of Plover Islands * * * where it shall be the highest highwater mark on the outer shore of these islands and the sandspits at either end. In cases where the barrier

[16] *See* the handwritten note at the bottom of Exhibit C, which indicated the Secretary's decision.

reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainlands.[17]

This order has remained in effect to the present day, and in fact Congress has enacted detailed instructions for managing this reserve, including transferring management of it to the Department of the Interior. See Naval Petroleum Reserves Production Act of 1976, Apr. 5, 1976, 90 Stat. 303, 42 U.S.C.A. § 6501 *et seq.* (West Supp. 1977). That the area withdrawn in 1923, including coastal submerged lands, remains in federal ownership is not and cannot be seriously disputed.

Nearly two decades before PLO 82 was signed, the Department had issued some prospecting permits under the Mineral Leasing Act for oil and gas which included submerged lands in the Arctic Ocean in the vicinity of Smith Bay.[18] All of these permits had been cancelled or had expired by about 1932, 12 years before PLO 82. We have found no evidence that drilling occurred on any of these permits, but the fact that such permits had been issued could have raised concern that submerged lands in northern Alaska were subject to private exploitation and should be withdrawn. There is, however, no direct evidence that this possibility was actually considered by the drafters of PLO 82.

The oil industry had begun a serious move into the marine environment before World War II. In fact, oil wells were drilled off the coast of California in 1896. As early as 1928 bayous, swamps, and bays in Texas and Louisiana were being drilled. From 1938 to 1942, twenty-five wells were drilled just beyond the coastlines of Louisiana and Texas. Following World War II oil exploration on the continental shelf was resumed with 53 wells drilled between 1945 and 1949.[19] Offshore development during this early period always or nearly always followed development of the area immediately ashore. There was no onshore development in this area of northern Alaska at this time.

No contemporaneous assessment of the possibility of hydrocarbon production from the continental shelf north of Alaska has been uncovered. It might well have been regarded as too speculative to merit serious attention. The Arctic environment is not particularly hospitable to drilling in submerged lands principally because of ice floes and other problems related to the harsh climate. On the other hand, the waters overlying coastal submerged lands are quite shallow, often ranging in depth from 4 to 10 feet.

[17] *See* Exec. Order No. 3797–A (Feb. 23, 1923).

[18] These permits are on file in the BLM office in Anchorage.

[19] "Petroleum's Bright Crescent," *The Humble Way*, 9–20 May–June 1949. This account notes the difficulty, cost, and uncertainty of the venture.

The Department had some reason to fear interference with a federal oil and gas exploration and development program. I have already discussed the 1937 Solicitor's Opinion holding that "public lands" could include coastal submerged lands. There was also a 1941 Opinion of the Attorney General which equated the words "public domain" in the Mineral Leasing Act to "public lands." [20] Moreover, as we have seen, the Department had issued prospecting permits for oil exploration in Smith Bay in Alaska in the 1920's, which included some submerged lands. These permits were issued under the Mineral Leasing Act, apparently on the theory that the Mineral Leasing Act extended to submerged lands, at least in territories. This position was not overruled until 1947, in an opinion dealing with coastal submerged lands adjoining states.

There is one other piece of evidence indicating that withdrawal of the submerged lands in Alaska from the operation of the public land laws would not have been meaningless. Congress extended the application of certain mining laws to Alaska in 1900, and provided that citizens or persons intending to become citizens "shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide * * * ." See Act of June 6, 1900, 31 Stat. 321, 329; see also 30 U.S.C. § 49a (1970). This legal authority to mine submerged lands might be regarded as an example of the kind of threat to federal mineral management for the war effort that PLO 82 was designed to forestall, although I hasten to add there is no evidence that the drafters of PLO 82 considered it.

Finally, it might be observed that the drafters of PLO 82 need not have foreseen federal development efforts directly on or over the submerged lands in question in order to withdraw them. Rather, the purpose was to prevent private activity anywhere in the general area from interfering with proposed federal activity. (The Nov. 20, 1942 Memorandum for the Secretary, attached as Exhibit C, simply points out that any federal activity "would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn * * * .") Such private activity on or near inland submerged lands might well have posed complications to proposed federal activity on the submerged lands or on adjacent uplands. It would have been unwise to stop the withdrawal at the boundaries of inland waters. This is especially so since the inland submerged lands would have included those under non-navigable as well as navigable waters. There was no reason to distinguish between the two at the time, especially in light of PLO 82's purpose. Interference from activity on adjacent land might have been a little harder to foresee were coastal submerged land involved, but such interference could be imagined. Rights-of-way for transportation access, for ex-

[20] 40 Op. Atty. Gen. 9 (1941).

ample, might have been required over lands admittedly covered by PLO 82 in order to get to coastal submerged lands.

Given the state of technology, I believe it was reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the uplands, including in and around inland waters, but much less reason to perceive a threat of interference from private drilling in coastal submerged lands. To this extent, given the urgency of the war effort and the purpose of the 1943 withdrawal to protect federal petroleum exploitation, I believe it would have been reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the beds of inland navigable waters, and therefore conclude that, to effectuate fully the important purpose of the Order, inland submerged lands were intended to be included. On the other hand, because offshore drilling technology was in relative infancy, untried and unproven in hostile environments such as the Arctic, and because the threat of interference from private activity was less, I believe it was less reasonable to assume the drafters intended to include coastal submerged lands.

D. Subsequent Modification of PLO 82.[21]

After it was issued, PLO 82 was modified several times, for purposes unrelated to the current issue before it was revoked. With one exception, these subsequent modifications shed no light on whether PLO 82 included submerged lands. Where they mention the area withdrawn by PLO 82, they merely parrot the description set forth in PLO 82.

The one exception is PLO 1621, which modified PLO 82 to permit, in the area of "Northern Alaska" withdrawn by PLO 82, entries under the mining laws and issuance of mineral leases pursuant to the Mineral Leasing Act of 1920. PLO 1621 expressly disclaimed any effect on the "following-described lands" which were reserved by Executive Order in 1923 upon the creation of Naval Petroleum Reserve No. 4. As discussed earlier, these "following-described lands" included coastal submerged lands. (See pp. 166–167, *supra.*) Therefore, PLO 1621 reflects the Department's understanding in 1958 that PLO 82 included coastal submerged lands.

[21] At least one nearly contemporaneous Public Land Order explicitly mentioned areas off the coast. *See* PLO 169, Sept. 21, 1943, 11 F.R. 8366 (Aug. 2, 1946). ("Northwesterly, with the 5 fathom line around Ocean Cape".) The PLO was issued on the authority of a statute providing for the creation of national forests, 16 U.S.C. § 473 (1970), was entitled "Withdrawing Public Lands for Use of the War Department for Military Purposes." Originally classified confidential, it was made public pursuant to a letter of the Secretary of War dated July 31, 1946. The jurisdiction it created expired in accordance with terms of the Order six months following termination of the unlimited national emergency then in effect. We have not found an explanation for this unusual withdrawal, but because it expressly included a coastal area, the failure to do so in PLO 82 could be seen as an intention not to withdraw such an area.

PLO 82 was revoked on Dec. 6, 1960 by PLO 2215.[22] The revocation order provides insight into the common understanding of PLO 82 inside the Department during this period. It not only revoked PLO 82, but also described and discussed the 1923 withdrawal of lands for Naval Petroleum Reserve No. 4. As we have seen earlier, NPR–4 included some submerged lands between the sandspits and islands forming the barrier reefs and the mainland. Before describing the boundaries of NPR–4, PLO 2215 makes the following statement:

"The following-described lands *lying within the exterior boundaries of* the area described in paragraph 1 [that is, the land withdrawn by PLO 82] are withdrawn by Executive Order No. 3797–A [creating NPR–4].[23]

It seems plain that the drafters of PLO 2215 regarded PLO 82 as including submerged lands off the coastal mainland.[24]

This inference is also supported by PLO 2214, issued the same day as PLO 2215. This Order formally created the Arctic National Wildlife Range, and it included submerged lands off the mainland in much the same fashion as NPR–4. Specifically, the northern boundary of the range was described as follows:

Beginning at the intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with the line of extreme low water of the Arctic Ocean * * * thence westerly *along the said line of extreme low water, including all offshore bars, reefs and islands* to a point of land on the Arctic seacoast known as Brownlow Point * * *[25]

Thus, although both PLO 2214 and 2215 provide no help in ascertaining the Secretary's intent in 1943, and although both include only some submerged lands now at issue (those within the barrier islands), they do—along with the maps prepared and published by the Department in July 1958 (see p. 162, *supra*)—indicate the understanding of the extent of PLO 82 at the time it was repealed.

III. THE IMPACT OF THE SUBMERGED LANDS ACT AND THE ALASKA STATEHOOD ACT

PLO 82 preceded by ten years the passage of the Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*, (1970), which, among other things, granted to states then existing the submerged lands lying off their coasts. Sec. 6(m) of the Alaska Statehood Act of 1958, 48 U.S.C. Prec. § 21, made this provision applicable to Alaska:

[22] Except for certain lands of the Arctic Wildlife Refuge and for Naval Petroleum Reserve No. 4, PLO 2215 opened the lands to settlement and to (a) filing of applications, selection and location allowable on unsurveyed lands under the nonmineral public land laws, the homestead and Alaska homesite laws; and (b) selection by the state under the Alaska Statehood Act. It also validated certain preference right claims.

[23] 25 FR 12599 (Dec. 9, 1960). (Italics added).

[24] PLO 2215 stated that the area withdrawn by PLO 82 "contains approximately 48,000,000 acres." This is 800,000 acres less than the estimate contained in PLO 82. There is no indication of the derivation of this estimate.

[25] 25 FR 12598 (Dec. 9, 1960). (Italics added.)

> The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Except for sec. 5(a) of the Submerged Lands Act, the coastal submerged lands or those underlying inland navigable waters would unquestionably have passed to the State upon its admission to the Union. However, sec. 5(a) (43 U.S.C. § 1313(a) (1970)), excepts from the grant to States

> all lands expressly retained by * * * the United States when the State entered the Union (otherwise than by a general retention * * * of lands underlying the marginal sea) * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right.

If either of these exceptions to the broad statutory grant applies, the Submerged Lands Act is prevented from operating through the Statehood Act to relinquish the submerged lands to Alaska.

The first exception in the Submerged Lands Act refers to lands expressly retained by the United States when the State entered the Union other than by a general retention of lands underlying the marginal sea. The issue is whether PLO 82 qualifies as *expressly retaining* the submerged lands for the United States when Alaska entered the Union in 1958.

The legislative history of this section of the Submerged Lands Act shows that Congress' intent was to prevent the federal executive from arguing that lands have been retained merely by operation of the doctrine that the United States had paramount title to the land. For example, the debate on the Senate floor made clear that this provision allowed the Federal Government to reserve "areas * * * used by the government in its governmental capacity for one or more of its governmental purposes."[26] Following this reasoning, any formal withdrawal like PLO 82 for a plain governmental purpose would qualify as an "express retention."

The courts have so interpreted sec. 5(a). In the 1970 case of *United States* v. *State of Alaska*, discussed above, the Court of Appeals held that the land underlying Lake Tustumena did not pass to the State of Alaska upon statehood because of this section. The court noted that the

> language of the Order is sufficiently clear to withdraw the water of the lake and the submerged land, [and therefore] the state's rights, if any, are subsequent in time and inferior in right to those of the appellant.

423 F. 2d at 768.

The court deemed the language "all of the hereinafter-described areas of land and water" an express retention of those lands underlying Lake Tustumena.

The *State of Alaska* case teaches that, in order to qualify as "ex-

[26] 99 Cong. Rec. 2619 (1953) (Remarks of Sen. Cordon).

pressly retained" under sec. 1313 of the Submerged Lands Act, the submerged land need not be specifically described in the withdrawal order.[27] PLO 82 withdrew "all the public lands * * * within the following described areas," including "all that part of Alaska lying north of a [specific] line." This description is as precise as that held to be an express retention in the *State of Alaska* case. This, plus the analysis in Section II of this opinion, leads me to conclude that PLO 82 expressly retained the lands it withdrew for the United States. The fact that PLO 82 was issued for a particular purpose—protection of those lands from private exploitation—adds force to the argument that they were not merely "generally retained." See also *United States* v. *City of Anchorage, State of Alaska*, 437 F. 2d 1081 (9th Cir. 1971).

I therefore conclude that the "expressly retained" exception in sec. 5(a) of the Submerged Lands Act would have prevented title to the submerged lands withdrawn by PLO 82 from passing to the State upon statehood.

On the other hand, because I determine herein that the coastal submerged lands were not withdrawn by PLO 82, I must consider the second exception in sec. 5(a); viz. whether the United States has "any rights * * * in lands presently and actually occupied by the United States under claim of right." Except for the Arctic National Wildlife Range, discussed below at pages 175–177, there is scant evidence that the United States actually occupied these coastal submerged lands at statehood. The Supreme Court has also recently indicated that this exception should be narrowly construed. *See United States* v. *California*, 436 U.S. 32 (1978). Therefore, I hold that the second exception does not apply.[28]

IV. RULES OF CONSTRUCTION OF FEDERAL GRANTS

I have considered, in reaching my conclusions herein, the applicable rules of construction for orders such as PLO 82. One well-established principle is that grants by the Federal Government "must be construed favorably to the government and * * * nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government." [29] This doctrine ap-

[27] The Joint Resolution on sec. 5 of the Submerged Lands Act shows that the term "specifically described" as modifying "tracts or parcels of land" was included in an earlier draft but later deleted. The explanation of the deletion was that it was for "perfecting" purposes. 1953 U.S. Code and Admin. News, 1490, 1496. This indicates an intent to make the phrase symmetrical with later references in the section to "lands."

[28] A respectable argument might be made that the coastal submerged lands in the Arctic National Wildlife Range are protected in federal ownership as a result of this "claim of right" exception. Because I conclude below that these lands were expressly retained at statehood, (*see* pp. 175–177), there is no need to consider this argument further at this time.

[29] *Caldwell* v. *United States*, 250 U.S. 14 (1919); *Shively* v. *Bowlby*, 152 U.S. 1, 10 (1894); *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262 (1942).

plies to grants to states as well as grants to private parties.[30] This means that section 5(a) of the Submerged Lands Act must be read to resolve ambiguities in favor of the Federal Government, which in turn means that PLO 82 prevented transfer of title, to the State of Alaska upon statehood, of the submerged lands that I have determined it withdrew.

There are cases holding that lands under navigable waters in territories are held by the Federal Government for the ultimate benefit of future states, and are not disposed of by the United States "save in exceptional circumstances when impelled to particular disposals by some international duty or public exigency." See *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926); *Shively* v. *Bowlby*, 152 U.S. 1, 49, 57–58 (1894). Therefore, disposals by the United States are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U.S. at 55.

There are several reasons why these cases might not be apposite here. First, there is arguably no "disposal" of the public land here, to the derogation of the future state's possible ownership.[31] Instead, the only question is whether these submerged lands were reserved to the United States rather than disposed of to third parties. In fact, insofar as PLO 82 sought to prevent private mineral developers from accruing rights on the lands reserved, it furthered the interests of the future State of Alaska by protecting the land ultimately for selection by the State upon statehood.

Second, and more important, I believe that a definite intention can be found in PLO 82 to reserve the inland (but not the coastal) submerged lands, as one was found in another Alaska withdrawal creating the Kenai Moose Range, *United States* v. *State of Alaska*, 423 F. 2d 764, 767 (9th Cir. 1970).

Finally, *Holt State Bank* and *Shively* v. *Bowlby* both refer to the right and responsibility of the United States to dispose of the public lands in a territory to meet some "international duty or public exigency." PLO 82's direct relationship to the prosecution of World

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[30] *Dubuque and Pacific R.R. Co.* v. *Litchfield*, 64 U.S. (23 How.) 66 (1859).

[31] The Secretary's construction of a public land "disposition" as relating to those acts which convey or lead to the conveyance of title by the United States—such as grants or allotments—was upheld by the Supreme Court in *Udall* v. *Tallman*, 380 U.S. 1, 19–23 (1965). That holding admittedly did not concern a reservation of public lands from conveyance to a state, but rather withdrawing lands from mineral leasing; nevertheless, it sheds some light on the term "disposition." Although the *Holt State Bank* case, *supra*, appears to treat an alleged reservation of submerged lands to fulfill a treaty obligation with an Indian Tribe as a "disposal," *see* 270 U.S. at 55, 58, that case ultimately turned on the Court's holding that the submerged lands were not intended to be reserved.

War II—a "public exigency" beyond challenge—allows ample room for arguing that, even if PLO 82 is a "disposal" of public lands, it is sufficiently plain to fall within the exception these cases recognize. See *United States* v. *City of Anchorage*, 437 F. 2d 1081, 1085 (9th Cir. 1971), where the Court of Appeals described the establishment of the Alaska Railroad as one of those "exceptional instances" which fell within the exception to the general rule of *Holt State Bank* and *Shively*, and found submerged lands were withdrawn even though there was no express reservation. As the Supreme Court said most recently in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 634 (1970):

> [N]othing in the *Holt State Bank* case or in the policy underlying its rule of construction * * * requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor.

And further:

> [I]t seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. * * * [T]he question is whether the United States intended [to do so].[32]

V. THE EFFECT OF REVOCATION OF PLO 82 IN 1960

The final question is whether the State automatically gained title to the lands upon revocation of PLO 82 in 1960, one year after statehood.

The short and complete answer to this contention is that it is foreclosed by the express language of section 5(a) of the Submerged Lands Act, which exempts from transfer "[a]ll lands expressly retained by * * * the United States *when* the State entered the Union * * *." 43 U.S.C. § 1313(a) (1970). (Italics added.) The exception operates at a fixed point in time; namely, upon statehood. The inclusion of this clause implies that if this exception is applicable at the time of statehood, it constitutes a permanent retention by the United States of those submerged lands. Thus, the subsequent revocation of PLO 82 did not divest the United States of title to the submerged lands withdrawn by PLO 82. The revocation of PLO 82 might allow the State of Alaska to select these submerged lands as part of their entitlement under the Statehood Act, subject to federal approval as required by that Act.[33] But mere revocation of the Order could not have automatically transferred title to the State.[34]

VI. CONCLUSION

For the reasons set forth above, I conclude that PLO 82 expressly reserved the submerged lands un-

[32] 397 U.S. at 633.

[33] See note 4, *supra*. The Statehood Act authorizes the State to select certain kinds of "public lands." Whether the phrase "public lands" in this context includes submerged land requires an inquiry similar to that set forth in Part II.A above, and I have not conducted such an inquiry in preparing this opinion.

[34] This conclusion is reinforced by section 4 of the Alaska Statehood Act, which provides that the State "forever disclaim[s] all right and title to any lands * * * not granted or confirmed to the State * * * by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States * * *." 48 U.S.C. Note Preceding § 21.

derlying inland navigable waters within the area it withdrew in northern Alaska, and that therefore such lands did not pass to the State of Alaska under the Alaska Statehood Act, by operation of the Submerged Lands Act, and did not pass to the State upon revocation of PLO 82. I also find, however, that PLO 82 stopped at the ocean's edge, and did not withdraw the coastal submerged lands. Therefore title to these lands passed to the State upon statehood.

Finally, as noted earlier, the face of PLO 82 itself suggests, on balance, that the withdrawal extends to the actual coastline. If, as I believe, the better argument is that the withdrawal stopped at the water's edge, there is nothing to suggest that the drafters intended it to extend to the legal or constructive as opposed to the actual, physical coastline. Therefore, I believe the intent is best served if we interpret PLO 82 as withdrawing only to the actual coastline.

VII. EFFECT OF CONCLUSION ON BOUNDARY OF ARCTIC NATIONAL WILDLIFE RANGE

Because I have concluded that PLO 82 did not reserve the coastal submerged lands, there was no formal, completed withdrawal which reserved the coastal submerged lands in the Arctic National Wildlife Range area prior to Alaskan statehood in 1959. The land ultimately included in the Range had, however, been described in an application for a withdrawal filed by the Fish and Wildlife Service in January 1958, one year before statehood. *See* 23 FR 364.

Under the regulations then in existence, 43 CFR 295.11(a) (1959 Supplement), the application operated by itself to segregate the land from all forms of disposal under the public land laws, to the extent that the withdrawal applied for would, if finally executed, prevent such forms of disposal. This segregative effect remained until final action was taken on the application. This fact was noted and given added momentum in PLO 1621 signed Apr. 18, 1958, eight months before statehood. *See* p. 169 *supra*.

Because ultimate placement of these lands in the Wildlife Range prevented their disposition to the State, it is obvious that the segregative effect of the withdrawal application was, under the regulations in effect at that time, effective against passage of title of submerged lands to the State upon statehood.

The only fact that could lead to doubts about this conclusion is a brief opinion signed by the Deputy Solicitor in 1959 regarding the effect of a pre-statehood application for a withdrawal of coastal submerged lands for a proposed Aleutian Islands National Wildlife Refuge upon passage of title to the State. See M–36562 (Aug. 21, 1959). This opinion concludes that the segregation of the coastal submerged

lands by the withdrawal application is not sufficient to prevent title from passing to the State at statehood by operation of the Submerged Lands Act made applicable to Alaska by the Statehood Act.

Unfortunately, this opinion contains almost no reasoning to support its conclusion. Most particularly, it does not even consider the effect of sec. 5(a) of the Submerged Lands Act, excepting from transfer to the State those lands expressly retained by the United States, or "presently and actually occupied by the United States under claim of right." The core issue that the opinion should have addressed, but instead ignored, was whether a segregation (by application) qualified under sec. 5(a) to prevent passage of title at statehood.

As I have discussed earlier, it is plain that a completed withdrawal of lands qualifies as an express retention under the Submerged Lands Act. The Departmental regulations in effect at that time gave an identical effect to an application—it segregated the lands from disposal to the same extent that the withdrawal applied for would, if finally executed, have done. The purpose of the regulation is clear: The filing of an application prevented anything from happening, prior to a decision on the application, which would have rendered a favorable decision on the application impossible. Now the Secretary might well have decided in his discretion to reject a previously-filed application because of statehood, and instead let the State select the submerged lands included in the application. But to allow statehood by itself to override the segregative effect of withdrawal applications provided for in the regulations substantially vitiates the meaning of the "expressly retained" proviso in the Submerged Lands Act.[35] That being the case, I have no difficulty in overruling the Deputy Solicitor's opinion and finding that the prestatehood application for a withdrawal operated as an express retention of the lands at statehood under the Submerged Lands Act, and prevented passage of title of the coastal submerged lands to the State.

Therefore, my opinion that PLO 82 did not withdraw the coastal submerged lands in northern Alaska (including those coastal submerged lands ultimately included in the Arctic National Wildlife Range) does not mean that the coastal submerged lands in the Range passed to the State at statehood. Instead, the 1958 application by the Bureau of Sport Fisheries and Wildlife and the management of those lands for

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[35] It also substantially vitiates the meaning of § 6(e) of the Statehood Act, which excepts from transfer to the State "lands withdrawn *or otherwise set apart as* refuges or reservations for the protection of wildlife * * *." (Italics added.) This proviso was very briefly considered by the Deputy Solicitor in his 1959 opinion. In the last sentence of that opinion, he observed that he could "find nothing" in that proviso to support a conclusion that the withdrawal application prevented passage of title to the State. This ignored the plain implication of the underlined language in § 6(e); *i.e.*, lands may not only be *withdrawn* for wildlife protection but also "otherwise set apart" for such purposes. Although the mere filing of the application did not create a formal "refuge" within the language of sec. 6(e), the application for a withdrawal for such purposes under then-existing regulations operated in fact to set the lands in the application apart and reserve them for possible use for the protection of wildlife until the application could be ruled on.

wildlife purposes operated to retain the lands in federal ownership, where they remain.

LEO KRULITZ,
Solicitor.

EXHIBIT A
[PUBLIC LAND ORDER 82]

ALASKA

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following-described areas are hereby withdrawn from sale, location, selection, and entry under the public-land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war:

NORTHERN ALASKA

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of Firth River, approximate latitude 68°52′ N., longitude 141°00′ W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

The area described, including both public and non-public lands, aggregates 48,800,000 acres.

ALASKA PENINSULA

Beginning at the highest point on Mt. Veniaminof, approximate latitude 56°13′ N., longitude 159°24′ W.;

South, approximately 24 miles, to a point on the north shore of Ivanof Bay;

Northeasterly, approximately 400 miles, along the Pacific Ocean, Shelikof Strait and Cook Inlet to Tuxedni Bay;

Northwesterly, approximately 46 miles, along the south shore of Tuxedni Bay, to the headwaters of the principal stream entering Tuxedni Bay from the west, across the Aleutian Range of mountains to the most northerly point of Little Lake Clark;

Southwesterly, approximately 340 miles, along the easterly shores of Little Lake Clark, Lake Clark and Sixmile Lake to Newhalen River, downstream along the left bank of Newhalen River to Iliamna Lake, southwesterly along the north

and west shores of Iliamna Lake to Kvichak River, downstream along the left bank of Kvichak River, and the shores of Kvichak Bay and Bristol Bay, to a point due north of the point of beginning;

South approximately 22 miles, to the point of beginning.

The area described, including both public and non-public lands, aggregates 15,600,000 acres.

KATALLA-YAKATAGA

Beginning at Cottonwood Point, at the mouth of Copper River, approximate latitude 60°17′ N., longitude 144°55′ W.;

Northerly, approximately 18 miles upstream along the left bank of Copper River to a point on the North boundary of the Chugach National Forest;

Easterly, approximately 32 miles, along the north boundary of the Chugach National Forest to the east boundary of the national forest;

East, approximately 100 miles, to the boundary between the United States and Canada;

South, approximately 16 miles, along the International Boundary to Mt. St. Elias;

South, approximately 38 miles, across Malaspina Glacier, to the Gulf of Alaska;

Westerly, approximately 140 miles, along the Gulf of Alaska, to the point of beginning.

The area described, including both public and non-public lands, aggregates 3,040,000 acres.

The total area described in the three tracts aggregates approximately 67,440,000 acres.

This order shall not affect, or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the above-described lands under the public-land laws, including the mining laws, and the leasing of the lands under the mineral-leasing laws.

ABE FORTAS,
Acting Secretary of the Interior.

JANUARY 22, 1943.

[F.R. Doc. 43-1796; Filed, February 3, 1943; 9:45 a.m.]

[8 FR p. 1599, 2/4/43]

EXHIBIT B

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

Nov. 20, 1942.

MEMORANDUM for the Secretary.

The attached draft of a public land order would withdraw, subject to valid existing rights, the described lands from sale, location, selection or entry under the public land laws including the mining laws, and from leasing under the mineral leasing laws, and reserve the minerals in the lands for use in connection with the prosecution of the war. There are also attached a letter to the Attorney General, and a letter to the Director, Bureau of the Budget.

There are in the areas described in the proposed order approximately 360 patented entries embracing about 3,000 acres, 64 oil and gas leases embracing approximately 137,006 acres, and about 105 oil and gas lease applications embracing approximately 84,000 acres. If and when this order is signed the lease applications will be rejected.

The strategic position of Alaska with relation to the war effort has multipled many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory. Notwithstanding the extremely favorable terms which are accorded to private oil operators under the oil and gas leasing act, both as originally approved in 1920 and as amended in 1935, there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of any immediate operations in the area by private concerns is slight.

Consideration is being given to the possibility of exploration by the Government with a view to the possible discovery of a source of oil for the use of the armed forces. It is likely that any such exploration if it is undertaken, would be subject to interference on the part of numerous private claimants, lessees, etc., unless the land were first withdrawn from exploration by the public.

This withdrawal is proposed as an effective means of reserving the land to permit of the perfection of the necessary arrangements and of the completion of any exploration program that may be undertaken.

It is recommended that you sign the attached letters to the Attorney General and the Director, Bureau of the Budget.

FRED W. JOHNSON,
Commissioner.

EXHIBIT C

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON

Nov. 16, 1942.

MEMORANDUM for Mr. Havell:

In response to your memorandum of November 13 to Mr. Deeds in which you propose a withdrawal from all forms of entry, but really, I understand, for the protection from exploitation of any contained oil, of three great tracts of public land in Alaska which you designate as Northern Alaska, Alaska Peninsula, and Katalla-Yakataga:

Your Northern Alaskan proposal constitutes an enlargement of existing Naval Petroleum Reserve No. 4. Naval Reserve No. 4 as now described includes, with a wide margin of safety, the seepages at Cape Simpson,

the chief and practically the only direct evidence of the existence of oil in this remote area. The boundaries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging Naval Reserve No. 4 and, therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

Your proposed Alaska Peninsula withdrawal covers the known favorable structures in that part of the Territory with their accompanying seepages, together with the areas that have been drilled. While the proposed withdrawal is abundantly generous, the difficulties of segregating by detailed description the areas within it that contain potentialities, are recognized. If a withdrawal is deemed advisable, despite the fact that the Secretary now has the power to reject all applications for oil rights under the oil land leasing act, then this is an area in which such action is justified.

For similar reasons your proposed withdrawal of the Katalla-Yakataga area is not objected to, even though it includes a vast terrain that is covered with glaciers and intensely folded mountain regions that are impossible from the point of view of oil content or recovery.

The justification of the withdrawal of the Alaska Peninsula area, in so far as it rests upon the possibility of oil content in the land is that the southeastern border of that area contains definitely recognized and mapped structures which, so far as such features alone are concerned, are favorable to the trapping of any oil present. The structural evidence is fortified in a measure by known oil seepages and the revelation in some shallow wells that have been drilled of minor and thus far non-commercial quantities of oil.

The justification for the Katalla-Yakataga withdrawal lies in the fact that in the Katalla area a small yield of high-grade oil was obtained for a number of years from a group of shallow wells. No oil is now produced in this area but additional oil probably can be produced in small quantities. The Yakataga portion of the area contains untested, apparently favorable structures. Testing by drilling appears to be justified.

Consideration of course will be given in your office to the effect of any proposed withdrawals upon existing Forest Reserves, Military or Naval reservations, Fish and Wildlife protection, and similar matters of which the Survey has no especial cognizance.

W. C. MENDENHALL,
Director.

11–18–42.

NOTE: I discussed with Secretary Ickes and he instructed that we proceed with the withdrawal of the three (3) areas.

[This note was handwritten] WOLFSOHN.

TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM JICARILLA APACHE TRIBAL LANDS UNDER THE 1938 INDIAN MINERAL LEASING ACT

M-36896 (Supp.)

March 2, 1979

Indian Lands: Leases and Permits: Oil and Gas

Tribal royalties from leases of Jicarilla Apache tribal lands cannot be taxed by the State of New Mexico.

Indian Lands: Taxation

The taxation proviso contained in 25 U.S.C. § 398c (1970) does not apply to leases entered into under the 1938 Leasing Act (25 U.S.C. §§ 396a-396f (1970)). States cannot tax tribal royalties from such leases.

Mineral Leasing Act: Generally

Oil and gas leases of Indian lands entered into under the 1938 Mineral Leasing Act (25 U.S.C. §§ 396a-396f (1970)) are not subject to the taxation proviso contained in 25 U.S.C. § 398c (1970).

OPINION BY OFFICE OF THE SOLICITOR

February 2, 1979

To: ASSISTANT SECRETARY—INDIAN AFFAIRS

FROM: SOLICITOR

SUBJECT: TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM JICARILLA APACHE TRIBAL LANDS.

I advised you by a Nov. 7, 1977, opinion (M-36896, 84 I.D. 905 (1977)), that tribal royalties from production of oil and gas on Fort Peck tribal lands under leases made pursuant to the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 25 U.S.C. §§ 396a-396f (1970), are not taxable by the State of Montana. You have now requested my opinion as to whether a like conclusion is applicable to tribal royalties from leases of Jicarilla Apache tribal lands, with respect to taxation by the State of New Mexico.

The State of Montana asserted authority to levy taxes on production from the Fort Peck lands under purported sanction of 25 U.S.C. § 398 (1970) (Act of May 29, 1924, 43 Stat. 244), which had authorized taxation of production from tribal lands leased under 25 U.S.C. § 397 (1970) (Act of Feb. 28, 1891, 26 Stat. 795), that is, "bought and paid for" tribal lands. I concluded that the 1938 Leasing Act, which contained a comprehensive mineral leasing scheme but which did not contain a provision authorizing state taxation of production, did not incorporate the express taxing provision in the 1924 Act (25 U.S.C. § 398), and that therefore § 398 did not authorize taxation of royalties from production under leases made pursuant to the 1938 Act. I also noted in that opinion that there is no other statute which might grant authority for state taxation of Indian royalties from such leases.

The Jicarilla Apache Reservation is distinguishable from Fort Peck in that it is an Executive Order reservation, and New Mexico taxes production of oil and gas thereon

under purported authority of 25 U.S.C. § 398c. That section, worded similarly to the taxing proviso in § 398, was part of the Act of Mar. 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a–398e, which authorized mineral leasing on Executive Order reservations. Both that Act and its legislative history made clear that Congress intended the leasing authority for tribal lands on Executive Order reservations and the policy of permitting the states to tax production thereon to be the same as that applicable to "bought and paid for" reservations.[1]

As discussed in the Nov. 1977, opinion, the 1938 Act replaced the earlier fractionated leasing authorities (including §§ 398a–398e) with a comprehensive and uniform scheme for all reservations, with a few specific exceptions.[2] Sec. 398c cannot be distinguished from § 398 in this regard. Both were enacted prior to the 1938 Act, and the effect of the 1938 Act was the same on both. Thus, if the taxing proviso in § 398 was not incorporated into the 1938 Act, as I earlier concluded, neither was the taxing proviso in § 398c. Accordingly, it is my conclusion that taxation of production on Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. Absent specific statutory permission, New Mexico lacks authority to tax Indian property. (Solicitor's Opinion, M–36896 at 84 I.D. 10 (1977)) Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases.

LEO KRULITZ,
Solicitor.

[1] See, *e.g.*, S. Rep. 1240, 69th Cong. 2nd Sess. (1927); S. Rep. 768, 69th Cong., 1st Sess. (1926).

[2] The specific exceptions are named in § 6 of the 1938 Act, 25 U.S.C. § 396f.

NIELSONS, INC.

IBCA–1126–9–76

Decided *March 8, 1979*

Contract No. NOO C 1420 6159, Bureau of Indian Affairs.

Sustained.

1. Contracts: Formation and Validity: Bid Award

Where the contractor's bid is accepted during an extension of the bid acceptance period conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages, the Board finds that the contractor's conditional acceptance of a change order increasing prices for asphaltic materials to a certain date continued the bid qualification in effect and does not preclude recovery of asphaltic price increases thereafter.

2. Contracts: Construction and Operations: Actions of the Parties—Contracts: Performance or Default: Release and Settlement

Where the Government has accepted a bid conditioned upon the contractor not being prejudiced by changes resulting from energy related shortages and the parties agree in a change order to an increase in price for asphaltic materials, the Board finds the agreement does not constitute an accord and satisfaction precluding further price increases where the evidence shows there was no meeting

of the minds and this was evident to the contracting officer prior to execution of the change order.

APPEARANCES: Mr. Douglas M. Carnival, Attorney at Law, O'Connor & Hannan, Washington, D.C., for appellant; Mr. William Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant seeks to recover additional costs of $80,558.41 (plus interest) attributable to successive price increases in asphaltic materials during performance of a road construction contract. The contract was awarded after appellant had conditioned an extension of the bid acceptance period "on the basis it does not prejudice any action required by us in the event of unreasonable delay, description or change occurring in the work as a direct or indirect result of energy shortages and/or energy related material shortages." [1] By agreement of the parties during the hearing held on July 31, 1978, only the issue of entitlement is presented in this appeal (Tr. 91).

BACKGROUND

Appellant was the apparent low bidder on a project for the building of approximately 15½ miles of roadway between Whitehorse and Pueblo Pintado, New Mexico. The bid was opened by the Bureau of Indian Affairs (BIA) on Nov. 14, 1973. By its terms the bid was subject to acceptance within 60 days after opening. In an exchange of letters dated Jan. 11, 1974, the BIA requested and appellant granted a 30-day extension of the bid acceptance period with the above-quoted qualification. The BIA accepted appellant's bid under the qualified extension on Feb. 8, 1974, awarding a contract for $3,132,074.76.

By reason of a stipulation between the parties accepted by the Board as Board Exhibit 1, the parties do not dispute the following facts and sequence of events.

The contract required the use of large volumes of emulsified asphalt, grade CSS-1h under Item 312(2) and asphalt cement, 120-150 penetration under Item 403(2). Appellant placed a purchase order on Feb. 8, 1974, with Chevron.[2] Chevron rejected the purchase order on Mar. 23, 1974, advising that the quoted prices could not be honored because of the long delay between the quote and award, and that the prices that would apply to asphaltic materials would be those in effect at the time of delivery. Appellant notified the BIA of this resulting uncertainty of asphaltic material prices on Mar. 29, 1974. The changes in price of these materials per ton during the contract

[1] AF-A. All references herein will use the following abbreviations: appeal file=AF, transcript=Tr., appellant's exhibit=AX, and Government exhibit=GX.

[2] AF-O.

performance period is shown below:

Date	Item 312(2) emulsified asphalt	Item 403(2) asphalt cement
Nov. 14, 1973----	52.18	57.88
Mar. 23, 1974----	63.00	63.00
Sept. 13, 1974----	68.00	68.00
Jan. 30, 1975-----	73.00	73.00
Mar. 21, 1975----	82.02	82.02
June 18, 1975----	84.02	84.02

At the request of appellant, representatives of the BIA, appellant and Chevron met on Aug. 2, 1974, to discuss the price increases of asphaltic materials. Subsequently on Aug. 6, 1974, the BIA issued Change Order No. 2 increasing the unit prices of Items 312(2) and 403(2) to reflect the increased cost of asphaltic materials. The total contract price was increased by $189,000.30. By letter dated Aug. 7, 1974, appellant accepted Change Order No. 2 "with the condition that should the costs of the bituminous materials increase over the current prices due to scarcity, fluctuating market and/or the national energy crisis we have the right to claim reimbursement for the additional cost involved to purchase these bituminous materials." [3]

By letter dated Sept. 23, 1974, appellant advised the BIA of an additional increase by Chevron (on Sept. 13, 1974) in prices of asphaltic materials and requested another meeting to be scheduled.[4] The BIA responded by letter of Oct. 2, 1974, to appellant's letters of Aug. 7 and Sept. 23, 1974. The response advised that the contract contained no provision to pay increased costs for the stated reasons and that if appellant intended to file a claim, it should be done when the project is completed.

Thereafter, as the prices of asphaltic materials used on the project were increased, appellant notified BIA. On Aug. 25, 1975, after completion of the road project, appellant made a formal claim for an additional payment of $45,917.54 for such increases.[5] The claim was rejected by the contracting officer by letter dated Aug. 16, 1976.[6] Appellant timely appealed the adverse decision on Sept. 13, 1976. The amount of the claim was increased to $80,558.41 at the hearing by amendment of the complaint.[7]

Discussion and Findings

The Government contends (1) that the extension of the bid acceptance period did not cause appellant to lose its asphalt supply commitment because Chevron's quote expired in 15 days rather than 60

[3] AF–D.

[4] AF–E.

[5] AF–K.

[6] AF–E.

[7] Quantum was not presented at the hearing; however, Rule 4.108 permits the Board to allow either party to amend pleadings on conditions just to both parties. Noting that the appellant's release of claims did not reserve a specific amount, the amendment is allowed as nonprejudicial to the Government. Appellant must still present convincing proof of the actual price increase involved to the contracting officer.

days; (2) that Change Order No. 2 constitutes an accord and satisfaction as to appellant's entitlement to reimbursement for delay in awarding the contract; and (3) that the Government is not bound by declarations of its representatives at the Aug. 2, 1974, meeting because the representatives lacked authority to bind the Government.

Appellant contends that the condition attached to the extension of the bid acceptance period was a continuing one covering the entire performance period and that Change Order No. 2 was intended only to recognize cost increases up to Aug. 2, 1974, without limiting appellant's right to additional reimbursement if prices for asphaltic materials continued to rise.

The Government's first argument rests on evidence presented that the Chevron quotation on which appellant bid was based was verbal, and that a Mar. 1, 1974, letter from Chevron to appellant indicated a 15-day acceptance period on telephonic quotes.[8] The only documentary evidence supporting a 60-day acceptance period on Chevron quotations is a letter dated July 5, 1977, from the area sales manager of Chevron.[9] The Government challenges the value of this evidence which was discovered just prior to the hearing, and contends the contemporaneous evidence shows that appellant was not confronted with a change increasing his cost or time of performance because the Chevron quotation had expired 45 days before the end of appellant's bid acceptance period. The inference is that had the Government accepted appellant's bid prior to the end of the 60-day acceptance period, appellant would have been in the same position respecting an uncommitted source of asphaltic materials as he, in fact, was when appellant's bid was accepted during the qualified bid extension period.

The obvious conflict in the evidence over the length of time the Chevron quotation remained open for appellant's acceptance need not be resolved. The Government was not in a position to award the contract to appellant until after both appellant's and Chevron's (whether 15 or 60 days) acceptance periods would lapse.[10] Therefore, we are not concerned with determining the rights and obligations of the parties in the circumstances of an award having been made during the original bid acceptance period. It may be that a timely acceptance of appellant's bid would have resulted in Chevron's refusal to honor its quotation beyond 15 days. However, upon requesting and accepting appellant's qualified extension of the acceptance period, the Government assumed a new obligation toward appellant regarding liability for the then existing uncertainties regarding the prices for asphaltic materials.

[8] GX-Q.
[9] AX-I.

[10] AF-A, the BIA letter dated Jan. 11, 1974, requesting a 30-day extension of appellant's bid advises that National Park Service clearance to use the Pueblo Pintado Pit #1 as a material source had not been obtained.

The asphaltic price uncertainties may have existed with or without appellant's knowledge prior to the end of the acceptance period, but it is clear that appellant was aware of such uncertainties when asked to extend the bid acceptance period because it qualified the extension to avoid the potential losses due to the uncertain asphaltic pricing situation. Appellant could have refused to extend the bid period and thereby been protected against such potential losses. Instead, appellant granted the extension with a qualification to afford protection against the potential losses. Clearly, there is a significant difference between appellant's position prior to extension of the bid acceptance period and the extended qualified acceptance period. Even if Chevron's bid had expired 15 days after the bid opening on Nov. 14, 1973, as indicated by the Government, there was nothing to require appellant to give a bid acceptance extension on the same terms as the Government enjoyed during the original acceptance period. Whether or not appellant was in a position of risking great losses during the last 45 days of the original acceptance period, appellant had the right to refuse to extend the acceptance period or to attach conditions to the extension it did grant.

We find that the qualification of appellant's extension of the bid acceptance period was proper and accepted by the Government upon award of the contract during such extension.

The Government's second and third arguments will be treated together since the negotiations for Change Order No. 2 which is claimed to constitute an accord and satisfaction were conducted by the representatives whose authority to bind the Government is disavowed in the third contention. Mr. Ward and Mr. Dzick were the representatives for the BIA area office assigned to meet with appellant on Aug. 2, 1974, to consider the first post award price increase for asphaltic materials. Appellant claims that the purpose of the meeting was to negotiate an open ended contract agreement to cover past and future price increases in asphaltic materials (Tr. 44). The Government contends that the meeting was to negotiate a single price increase for asphaltic materials that did, upon appellant's acceptance, satisfy completely the qualified bid acceptance; and that, to the extent that either Mr. Ward or Mr. Dzick may have indicated otherwise, their lack of authority to bind the Government makes such declarations a nullity.

Change Order No. 2 does not contain clear language helpful to resolution of the issue. The explanatory paragraph preceding the authorization of a price increase of $189,000.30 under the changes clause states:

> Reference is made to your Contract No. NOO C 1420 6159 dated February 8, 1974 covering construction of 15.474 miles of roadway west of Whitehorse to Pueblo Pintado, New Mexico and to our meeting of August 2, 1974 in regards to the increased costs encountered by you because of the delay in making award.

The Change Order is signed by "Henry Wright, Acting Chief,

Branch of Contracting and Procurement Services." Mr. Wright did not attend the meeting of Aug. 2, 1974. The Change Order was acknowledged and accepted by appellant on Aug. 7, 1974, and returned to the BIA with a transmittal letter [11] of the same date stating:

> As per our discussions and verbal agreement at the meeting of August 2, 1974, attended by Mr. Walter Dzick, Mr. Eddie Ward, Mr. Cal J. Rickel, Mr. William Nielson and Mr. Edward Cook, we accept the enclosed signed Change Order No. 2 with the condition that should the costs of the bituminous materials increase over the current prices due to scarcity, fluctuating market and/or the national energy crisis we have the right to claim reimbursement for the additional costs involved to purchase these bituminous materials.

At the Aug. 2 meeting, Mr. Ward and Mr. Dzick represented the BIA. Mr. Rickel and Mr. Nielson represented appellant and Mr. Cook represented Chevron. Mr. Ward testified that the intent of the meeting, according to his instructions from the contracting officer, was to get the price for asphaltic material that day (Tr. 96–100). Mr. Nielson (Tr. 83) and Mr. Rickel (Tr. 42) testified that they sought to discuss the means to be reimbursed for future increases in asphaltic materials. The current price for the asphaltic materials was easily determined since Mr. Cook of Chevron was present. However, agreement could not be reached on future increases. Mr. Rickel (Tr. 45), Mr. Nielson (Tr. 80–81), Mr. Ward (Tr. 133), and Mr. Dzick (Tr. 151–2) all testified to collaborating in the drafting of a letter to address appellant's concern about future price increases. The resulting letter became the appellant's letter of Aug. 7, 1974, transmitting the signed Change Order No. 2. The change order contained a price adjustment based only on the prices for asphaltic materials on Aug. 2, 1974. Mr. Dzick testified that the standard procedure is that the contractual document would be prepared, sent to the contractor for signature, and then signed by the contracting officer when the contractor's signed copy was received (Tr. 150).

[1] The Government argues that Messrs. Ward and Dzick did not have the authority to bind the Government to any agreements as to future increases and that the right to claim reimbursement as used in the letter of Aug. 7, 1974, is different than a right to reimbursement. Whether the BIA representatives at the Aug. 2 meeting had authority is not necessary to decide. They were the representatives sent to determine the effect that the price of asphaltic material on that day would have on the contract. They determined this to be $189,000.30. Additionally, they heard the appellant's concerns expressed at the meeting that future price increases would need to be reimbursed and participated in drafting a letter for appellant's use in that regard. The contracting officer chose these representatives as his instruments of communication with appellant in

[11] AF–D.

the meeting to resolve the qualified acceptance of the bid. Whether they reported back all that occurred at the meeting or just the contract price increase necessary to adjust the contract to current asphaltic material prices is not conclusive. The remainder of the meeting results were communicated to the contracting officer in the Aug. 7 transmittal letter of Change Order No. 2, advising of appellant's conditions for acceptance of Change Order No. 2.

The transmittal letter clearly states the appellant's conditional acceptance of the Change Order based on the meeting of Aug. 2 and the expectation that additional price increases beyond that date could be claimed. Therefore, regardless of the authority of the BIA representatives at the meeting, the complete results of the meeting were reported to the contracting officer before he signed Change Order No. 2, *i.e.*, the current cost impact of price increases and the appellant's expectation that any additional increases would provide the basis for a claim for reimbursement. Consequently, a fully informed contracting officer signed the Change Order conditioned by a contemporaneous letter and accepted continued performance of the contract for 2 months before his letter of Oct. 2, 1974, in which he denies responsibility for additional price increases.

[2] Under these circumstances, the Government's claim that Change Order No. 2 constituted an accord and satisfaction must fail. There was a failure at the Aug. 2 meeting to have a meeting of the minds on the issue of whether the agreed upon increases were to cover increases to date or the entire contract because of the limited authority of the BIA representatives to consider anything other than increases to that date. Lacking a meeting of the minds, there could not be a new agreement of accord and satisfaction to replace the prior agreement of the parties regarding future price increases.

Additionally, upon signing Change Order No. 2, the contracting officer was fully aware that appellant had not agreed that the price increase in that document was sufficient to provide for the uncertain price fluctuations that might occur in the future. Neither appellant nor the Chevron representative were even asked to project the cost impact of asphaltic price increases over the contract period. It strains credulity to believe that the contracting officer would consider that a contract price adjustment based only on prices on Aug. 2, 1974, would be acceptable when the prices of these materials would be the prices in effect at the time of delivery and the bulk of such materials would not be delivered to the project until later stages of the contract performance. In this instance, we cannot agree with the contention of the Government that both parties must be presumed to have intended or recognized a distinctive difference between the phrases

"right to claim reimbursement" and "right to reimbursement." It is clear that only the Government considered the language to give the right to summarily deny claims for actual price increases in asphaltic materials after Aug. 2, 1974.

Therefore, we find the Change Order No. 2 was only conditionally accepted by the contractor and was therefore not an accord and satisfaction. We further find that the effect of the contracting officer signing and processing the Change Order without taking any exception to the terms outlined in the transmittal letter of Aug. 7, 1974, for a period of 2 months, was to acquiesce in such terms as the basis for payment of future price increases for asphaltic materials.

DECISION

The parties having agreed to limit the presentation of the instant appeal to the question of entitlement, we find that appellant is entitled to an equitable adjustment for price increases in materials procured for Items 312(2) and 403(2) after Aug. 2, 1974, plus interest pursuant to Clause 37, "Payment of Interest on Contractors' Claims," from the date of appeal of the contracting officer's adverse decision on Sept. 13, 1976.[12]

The appeal is remanded to the contracting officer for a determination of the amount of the equitable adjustment and interest.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

BERYL S. GILMORE,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

[12] AF–N. The date that interest commences under Clause 37 is "from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of the contract."

APPEAL OF RAYMOND A. KREIG

3 ANCAB 168

Decided *March 9, 1979*

Appeal of Raymond A. Kreig, from the Bureau of Land Management Decision #F–14912, dismissed Mar. 9, 1979.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Preference rights to purchase set forth in Public Land Order No. 1613, Apr. 7, 1958, that were outstanding as of the date of the passage of ANCSA, are valid existing rights protected by ANCSA.

2. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Conveyances: Generally

Valid existing rights held by third parties that lead to acquisition of title, must be identified in the conveyancing document and the land covered thereby excluded from the conveyance to the selecting Native corporation.

APPEARANCES: Raymond A. Kreig, pro se; M. Francis Neville, Esq., Office

of the Regional Solicitor, on behalf of the Bureau of Land Management; Elizabeth S. Taylor, Esq., on behalf of Doyon, Ltd.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1975), hereby makes the following findings, conclusions and decisions dismissing the appeal from the Decision of the State Director, Bureau of Land Management # F-14912.

On July 27, 1978, appellant filed a Notice of Appeal from the above-referenced decision. Appellant alleges that he has an interest in lands between the boundary line of U.S. Survey 2911 and the centerline of the Alaska highway which are located in Sec. 29, T. 15 N., R. 19 E., C.R.M. This land claimed by appellant has been approved for conveyance to Northway Natives, Inc., and Doyon, Ltd., pursuant to ANCSA. Appellant claims he has a right to purchase this highway frontage pursuant to the preference rights provision of Public Land Order 1613 of Apr. 7, 1958. The history of this parcel of land has been set forth as follows by the parties.

On Aug. 10, 1949, PLO 601 was enacted which reserved for highway purposes the public lands in Alaska within 300 feet of each side of the centerline of certain highways, including the Alaska highway. On May 5, 1954, Nell Kelley, appellant's predecessor in interest, received patent to U.S.S. 2911 which was adjacent to the Alaska highway reserve. On Apr. 7, 1958, the reservation set out in PLO 601 was revoked by PLO 1613. Public Land Order 1613 was issued by the Secretary of the Interior pursuant to legislation which permitted the Secretary to dispose of the land withdrawn for highway purposes after revocation of the withdrawal and after reservation of an easement for the highway. While this legislation permitted the Secretary to sell such formerly withdrawn land and reserve as easement for the highway, the legislation stated that the Secretary was to give an appropriate preference right to adjoining land owners and persons with valid unperfected entries. This legislation has been codified in 43 U.S.C.A. § 971a through e (West Supp. 1978). (70 Stat. 898, Aug. 1, 1956.) Secs. 971a and 971b which are relevant to the instant appeal state as follows:

> § 971a. Alaskan lands within highway, telephone, and pipeline withdrawals; disposal; amendment of land description of claim or entry on adjoining lands.
>
> Upon revocation of a withdrawal for highways, telephone lines, or pipelines, in Alaska, the lands involved shall be subject to disposal only under laws specified by the Secretary of the Interior, subject to easements as established by the Secretary. Notwithstanding any statutory limitation on the area which may be included in an unpatented claim or entry, the Sec-

retary may permit the amendment of the land description of a claim or entry on adjoining lands to include the restored lands.

Aug. 1, 1956, c. 848, § 1, 70 Stat. 898.

§ 971b. Same; sale; preference rights; consent of Federal agency.

The Secretary may sell such restored lands for not less than their appraised value, giving an appropriate preference right to the holders of adjoining claims or entries and to owners of adjoining private lands. If such lands are under the jurisdiction of a Federal department or agency other than the Department of the Interior, any sale thereof shall be made only with the consent of such department or agency.

Aug. 1, 1956, c. 848, § 2, 70 Stat. 898.

Pursuant to this statute, the Secretary issued PLO 1613 which revoked the withdrawal of certain highway reserves in Alaska, and in paragraph 7 of such order set forth preference rights of adjoining land owners. This paragraph states as follows:

The lands released from withdrawal by paragraphs 1 and 2 of this order, which, at the date of this order, adjoin lands in private ownership, shall be offered for sale at not less than their appraised value, as determined by the authorized officer of the Bureau of Land Management, and pursuant to Section 2 of the act of August 1, 1956, supra. Owners of such private lands shall have a preference right to purchase at the appraised value so much of the released lands adjoining their private property as the authorized officer of the Bureau of Land Management deems equitable, provided, that ordinarily, owners of private lands adjoining the lands described in paragraph 1 of this order will have a preference right to purchase released lands adjoining their property, only up to the centerline of the highways located therein. Preference right claimants may make application for purchase of released lands at any time after the date of this order by giving notice to the appropriate land office of the Bureau of Land Management. Lands described in this paragraph not claimed by and sold to preference claimants may be sold at public auction at not less than their appraised value by an authorized officer of the Bureau of Land Management, provided that preference claimants are first given notice of their privilege to exercise their preference rights by a notice addressed to their last address of record in the office in the Territory in which their title to their private lands is recorded. Such notice shall give the preference claimant at least 60 days in which to make application to exercise his preference right; and if the application is not filed within the time specified, the preference right will be lost. Preference right claimants will also lose their preference rights if they fail to pay for the lands within the time period specified by the authorized officer of the Bureau of Land Management, which time period shall not be less than 60 days.

Thus, as of Apr. 7, 1958, the effective date of PLO 1613, the reservation of the lands between U.S.S. 2911 and the centerline of the Alaska highway was revoked. Nell Kelley could have made application to purchase such formerly reserved lands which adjoined U.S.S. 2911, pursuant to PLO 1613. There is no evidence that Nell Kelley ever made such an application.

On Dec. 18, 1971, the Alaska Native Claims Settlement Act was passed by Congress. Sec. 11(a) of this Act withdrew certain public lands within Alaska, subject to valid existing rights, from all forms of appropriation under the public

land laws including mining and mineral leasing laws and from selection under the Alaska Statehood Act. Included within this withdrawal were those lands located within Sec. 29, T. 15 N., R. 19 E., C.R.M., which were withdrawn for the benefit of Northway Natives, Inc., and Doyon, Ltd.

Pursuant to § 12(a) of ANCSA, Northway Natives, Inc., filed a village selection application for those lands in Sec. 29, T. 15 N., R. 19 E., and on June 26, 1978, the Bureau of Land Management issued a decision for interim conveyance approving for conveyance to Northway Natives, Inc., the surface estate to Sec. 29, T. 15 N., R. 19 E., C.R.M., excluding U.S.S. 2911, Native Allotments F–12950 and F–14316, Parcel B, Chisana River, Nabesna River, and Tanana River. The subsurface estate was to be conveyed to Doyon, Ltd.

On July 27, 1978, appellant filed a Notice of Appeal with the Board. In this document appellant stated that he was currently buying all of the land in U.S.S. 2911 and that as soon as the purchase documents could be recorded he would be making application for the land between U.S.S. 2911 and the Alaska highway, pursuant to PLO 1613.

From documents filed with the Board it appears that on Aug. 23, 1978, a personal representative's deed was signed by the Executrix of the estate of Nell Kelley conveying to appellant all land within U.S.S. 2911. The file indicates that on Sept. 5, 1978, appellant filed his application with the BLM to purchase the land between U.S.S. 2911 and the Alaska highway.

Appellant has alleged that he has a valid existing right to the lands in question pursuant to PLO 1613 and that he is seeking these lands in order to have access from U.S.S. 2911 to the Alaska highway.

The Bureau of Land Management argues that the preference rights set forth in PLO 1613 do not have an expiration date, have not been extinguished, and therefore persons such as appellant who are owners of land adjoining the former Alaska highway withdrawal have a valid existing right to those purchase lands mentioned in PLO 1613.

Doyon, Ltd., the Native Corporation which is to receive the subsurface estate of land selected by Northway Natives, Inc., has alleged that appellant has no valid existing right to the land in question. They state that on Dec. 18, 1971, Congress withdrew these lands from "all forms of appropriation" under § 11 of ANCSA. At this time no application for purchase under PLO 1613 had been filed by appellant or his predecessor in interest and in fact was not filed until after Northway Natives, Inc., received a decision to convey these lands. Doyon contents that appellant and his predecessors, having failed to exercise their preference right prior to withdrawal and selection by Northway, and having failed to initiate a lawful entry prior to Aug. 31, 1971, as is required by § 22(b) of ANCSA, lost whatever preference right they might have had under PLO 1613.

The issue to be resolved in this appeal is whether the preference rights created in PLO 1613 are valid existing rights protected by ANCSA.

Nothing in either ANCSA or its implementing regulations specifically mentions PLO 1613 or the legislation from which it arose. ANCSA does, however, protect valid existing rights. Sec. 11 of ANCSA, which is entitled "Withdrawal of Public Lands," states in § 11(a)(1) that:

> The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, * * *.

Furthermore, § 14 of ANCSA, which is entitled "Conveyance of Lands," states in subparagraph (g) in part as follows:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

In interpreting what interests are included within the meaning of the term "valid existing rights" under ANCSA, the Secretary of the Interior has determined that certain rights of purchase held by third parties which were outstanding but unperfected as of the date of passage of ANCSA constitute "valid existing rights." Secretarial Order 3029 of Nov. 20, 1978 (43 FR 55287, Nov. 27, 1978), entitled "Valid Existing Rights Under the Alaska Native Claims Settlement Act" addressed in part the question of whether or not leases created by the State of Alaska on land tentatively approved to the State but made selectable for Native corporations under ANCSA, and the purchase rights to the land created by A.S. 38.05.077, were valid existing rights.

In discussing valid existing rights under ANCSA, the Solicitor's Opinion adopted by Secretarial Order No. 3029 as the position of the Department on the subject of valid existing rights, stated in part as follows:

> A fundamental principle of ANCSA is that "[a]ll conveyances made pursuant to this Act shall be subject to valid existing rights." In addition, the sections withdrawing land for Native selection (Sections 11(a), 16(a)) expressly provide that the withdrawal is "subject to valid existing rights." The revocation of prior reserves created for Natives is also "subject to valid existing rights." (Section 19(a)).
>
> Although the phrase "valid existing rights" is not specifically defined in Section 3 "Definitions", both the statute and the legislative history offer guidance as to its meaning.
>
> Section 14(g) provides in pertinent part:
>
> "Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement

(including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease, contract (etc.) * * *."

Section 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

Section 22(c) protects persons who have initiated valid mining claims or locations in their possessory rights if they have met the requirements of the mining laws.

By regulation the Department has construed Sections 14(g) and 22(b) and provided the mechanism for implementing them. 43 CFR 2650.3-1(a) provides:

"Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entry or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements."

* * * * * * *

* * * I do not believe the listing of the rights to be protected was intended to be limiting, but rather was *ejusdem generis*. The regulation already quoted (43 CFR 2650.3-1(a)) precedes its list with "such as those created by * * *," indicating clearly that the list is not exhaustive. Furthermore, there is not longical [sic] reasons why Congress would have intended to protect rights of municipalities or individuals which lead to the acquisition of title under such Federal laws as the Townsite Act or the Homestead Act, but did not intend to protect the same municipality or individual when the law under which the rights are being perfected is a State law.

It is my conclusion, therefore, that the department's regulations have construed "valid existing rights" under ANCSA to include rights *perfected or maintained under State as well as Federal laws leading to the acquisition of title.* (Italics added.)

This Solicitor's Opinion then concluded that leases issued by the State of Alaska under its "open-to-entry" leasing program prior to the passage of ANCSA, together with the outstanding right to purchase set forth by State statute, were valid existing rights which were to be excluded from the conveyance to the Native corporations.

It is clear from this Secretarial Order that valid existing rights are not limited to leases, contracts, permits, rights-of-way or easements mentioned in § 14(g) of ANCSA, but include other interests whether or not they are specifically set forth in ANCSA. Included within the meaning of the term valid existing rights are interests which are of a temporary or limited nature and interests which lead to the acquisition of title. Furthermore, if such interests were created prior to ANCSA they are to be considered valid existing rights if they have been perfected or if they are being maintained in conformance with the law under which they were created.

The purchase rights granted to the State issued open-to-entry leaseholders in A.S. 38.05.077 are in many way analogous to the preference rights to purchase here under consideration. The purchase rights

associated with the open–to–entry leases were rights granted by statute. The preference rights provision of PLO 1613 was issued pursuant to Federal statute. The purchase rights set forth in A.S. 38.05.077 which are protected as valid existing rights are associated with a leasehold interest granted to third parties by the State of Alaska prior to ANCSA. Secretarial Order 3029 did not require the holder of the lease to assert the right of purchase within a time frame prior to ANCSA. The preference rights provision of paragraph 7 of PLO 1613 which is here under consideration is associated with lands transferred to private ownership prior to the passage of ANCSA and had no set date required for perfection. Both the purchase rights set forth in A.S. 38.05.077 and the preference rights of purchase set forth in PLO 1613 were outstanding rights as of the date of passage of ANCSA. Furthermore, as of this date, neither the purchase rights set forth in A.S. 38.05.077 nor the preference rights of PLO 1613 have ever been terminated.

Besides the above–quoted language of ANCSA and Secretarial Order 3029, there is further language in ANCSA which indicates that Congress intended to protect rights such as those preference rights set forth in PLO 1613. Throughout ANCSA, Congress recognized and gave protection to various rights of access. Sec. 17(b)(2) of the Act provides that the Federal–State Land Use Planning Commission is to identify certain public easements across Native land. While most of the language in this section deals with easements for public use, paragraph 2 of this section mentioned other rights of access. This paragraph states as follows:

> In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.* (Italics added.)

The appellant in the present case has alleged that he is seeking to exercise the preference rights of paragraph 7 of PLO 1613 in order to provide access from the property he owns to the Alaska highway. Prior to the issuance of PLO 1613, the property owned by appellant adjoined the Alaska highway and had direct access to the highway. With the issuance of PLO 1613, the land between appellant's property and the centerline of the Alaska highway reverted to an unreserved status and appellant no longer had direct access to the highway. It appears from PLO 1613 and the legislation from which it arose, that the preference rights of adjoining land holders to purchase land between such privately held land and the

centerline of the Alaska highway was intended, at least in part, to prevent such privately held lands from being denied access to the Alaska highway.

[1, 2] Based upon language in ANCSA and its implementing regulations, and the policy of the Department of the Interior as set forth in Secretarial Order 3029, the Board finds that the preference rights to purchase set forth in paragraph 7 of PLO 1613 that were outstanding as of the date of the passage of ANCSA and that are being maintained in conformance with the requirements of PLO 1613, are valid existing rights protected by ANCSA, even though such rights lead to the acquisition of title. Pursuant to 43 CFR 2650.3-1(a) and Secretarial Order 3029, such rights which lead to the acquisition of title must be identified in the conveyancing document and land covered thereby excluded from the conveyance to the selecting Native corporation.

The allegation by Doyon, Ltd., that appellant's rights cannot be a "valid existing right" because he has not complied with § 22(b) of ANCSA, is without merit. Sec. 22(b) of ANCSA specifically deals with acquiring title to homesteads, trade and manufacturing sites, headquarters sites and small tract sites. Appellant is not claiming that his rights arise from any of these four specific laws and therefore § 22(b) is not dispositive of the issue in this appeal.

The preference right given to the owner of U.S.S. 2911 by paragraph 7 of PLO 1613 had not been extinguished and was outstanding as of the date of passage of ANCSA. Appellant, as the owner of U.S.S. 2911, has an application pending before the Bureau of Land Management to purchase land pursuant to PLO 1613. At the present time there has been no adjudication by the Bureau of Land Management on appellant's application. The Board, having found that the outstanding preference rights created in PLO 1613 are valid existing rights as that term is used in ANCSA, hereby finds that the land covered by appellant's application must be identified and excluded from the conveyance to Northway Natives, Inc., pending the adjudication of the claim of appellant.

Pursuant to the above findings, the Board hereby segregates from the above-referenced decision to convey those lands lying between U.S.S. 2911 and the centerline of the Alaska highway for which appellant has made application, and remands such land to the Bureau of Land Management for a determination on appellant's application filed pursuant to PLO 1613. Based upon the reasoning set forth in Secretarial Order 3029, those lands which the Bureau of Land Management determines are to be conveyed to appellant pursuant to paragraph 7 of PLO 1613, if any, are to be excluded from conveyance to Northway Natives, Inc., and the remain-

ing lands conveyed to Northway Natives, Inc.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairperson, Alaska Native Claims Appeal Board.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF YOSEMITE PARK AND CURRY COMPANY

IBCA-1232-12-78

Decided *March 16, 1979*

Contract No. NPS-WASO-IX-63-2, National Park Service.

Government Motion to Dismiss Granted.

1. Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Motions

A claim by a concessioner under a National Park Service Contract is dismissed as beyond the purview of the Board's jurisdiction where the contract contains no Disputes clause and by its express terms the Contract Disputes Act of 1978 is not applicable to the claim asserted.

APPEARANCES: Messrs. Richard A. Solomon and Dennis Lane, Attorneys at Law, Wilner & Scheiner, Washington, D.C., for appellant; Mr. John S. McNunn, Department Counsel, San Francisco, Calif., for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has filed a motion to dismiss the instant appeal for lack of jurisdiction on the grounds that the contract contains neither an equitable adjustment provision nor a Disputes clause. The appellant has filed an opposition to the motion. The complaint and the answer have been filed. Neither party has requested a hearing on the jurisdictional question presented.[1]

The contract here in issue was entered into under date of May 9, 1963, for a term of 30 years commencing Oct. 1, 1963, provided certain conditions were satisfied. Under the contract terms the concessioner (hereinafter referred to as the contractor), was committed to expending not less than specified sums upon capital improvements by specific times with a view to providing the public visiting Yosemite National Park with accommodation facilities and services at reasonable rates under the supervision and regulation of the Secretary.

For the most part, the electricity required for the accommodations and other facilities furnished to the visitors to the park appears to have

[1] The appellant filed with the Board on Feb. 26, 1979, a document entitled "Application for Oral Hearing And To Convene A Prehearing/Presubmission Conference." The application presupposes our retention of jurisdiction.

been obtained at approved rates from electricity sold to the contractor by Pacific Gas and Electric Co. and by the Southern California Edison Co. According to the complaint, however, a substantial portion of the electric power and energy supplied the park's visitors is generated at the National Park Service own hydroelectric facilities located in the park. The gravamen of the complaint is that the contractor is being charged excessive rates for the portion of the electricity supplied from the National Park Services own generating facilities.[2]

The following is quoted from contract provisions relied upon by the parties:

SEC. 3. Plant, Personnel, and Rates.

* * * * *

(b) (1) All rates and prices charged to the public by the Concessioner for accommodations, services, or goods furnished or sold hereunder shall be subject to regulation and approval by the Secretary, not inconsistent with an opportunity for the Concessioner to make a fair profit from the total of its operations hereunder. In determining fair profit for this purpose, consideration shall be given to the rate of return required to encourage the investment of private capital and to justify the risk assumed or the hazard attaching to the enterprise; the cost and current sound value of capital assets used in the operation; the rate of profit on investment and percentage of profit in gross revenue considered normal in the type of business involved; the financial history and the future prospects of the enterprise; the efficiency of management; and other significant factors.

(2) Reasonableness of rates and prices will be judged primarily by comparison with those currently charged for comparable accommodations, services, or goods furnished or sold outside of the areas administered by the National Park Service under similar conditions, with due allowance for length of season, provision for peak loads, average percentage of occupancy, accessibility, availability and cost of labor and materials, type of patronage, and other conditions customarily considered in determining charges, but due regard may also be given to such other factors as the Secretary may deem significant.

* * * * *

SEC. 6. Utilities. (a) The Secretary shall furnish utilities to the Concessioner, when available, and at reasonable rates to be fixed by the Secretary for use in connection with the operations authorized hereunder.

* * * * *

SEC. 22. General Provisions. (a) Operations under this contract shall be subject to the laws of Congress governing the park and the rules and regulations promulgated thereunder, whether now in force or hereafter enacted or promulgated.

(b) Reference in this contract to the "Secretary" shall mean the Secretary of the Interior, and the term shall include his duly authorized representatives.

The appellant opposes the granting of the Government's motion to

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[2] Addressing itself to the merits of the appeal, the Government states:

"In effect the Company in its Appeal is seeking an order compelling the Government to subsidize it by selling it power at a below-market rate while charging its customers market rates for services and accommodations in the Park. * * *

"It is the position of the Government that the 'value to the recipient' of electric power provided the Company at Yosemite is the price which the Company would necessarily have had to pay for power if power had not been provided to it by the Government. That price is determined by looking to the rates for power under comparable conditions outside Yosemite National Park's boundaries. That is precisely how Government electric rates are determined at Yosemite today."

(Government Answer, pp. 5 and 6.)

dismiss on the grounds (i) that the motion is based upon a narrow reading of the contract and applicable regulations;[3] (ii) that the Board has jurisdiction over a dispute if there are factual questions to be resolved;[4] and (iii) that the motion overlooks the fact that the guidelines[5] which the Government purported to apply in fixing the rates for utility service to the contractor and in rejecting the contractor's request for relief expressly provide for an appeal to the Director, NPS "through channels," and other governing regulations[6] make clear that such channels involve an appeal to this Board (Answer to Motion to Dismiss, p. 1).

In support of granting the motion the Government cites the decisions rendered in the cases of *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966): *American Cement Corp.*, IBCA–495–5–65 and IBCA–578–7–66 (Sept. 21, 1966), 73 I.D. 266, 66–2 BCA par. 5,849, *affirmed on reconsideration*, 74 I.D. 15, 66–2 BCA par. 6,065 (1967); *Pirates Cove Marina*, IBCA–1018–2–74 (Feb. 25, 1975), 75–1 BCA par. 11,109 (Motion to Dismiss, p. 2).

After delineating what it considers must be shown before the Board may exercise jurisdiction, the Government states:

[3] The appellant does not contend that the Contract Disputes Act of 1978 is dispositive of the jurisdictional question presented but rather contends that both the purpose for which the Act was passed, as well as its legislative history provide support for a liberal interpretation of the Board's authority. (Answer to Motion to Dismiss, p. 4, fn. 1.)

[4] Apparently with a view to supporting this position, the appellant quotes the following passage from our decision on reconsideration in *American Cement Corp.*, IBCA–496–5–65 and IBCA–578–7–66 (Jan. 10, 1967), 74 I.D. 15, 24–25, 66–2, BCA par. 6,065, at 28,070:

"Claim No. 5 as presented is unquestionably a claim for lost profits. Over such claims we have no jurisdiction. Neither in the earlier proceedings nor in connection with the present motion has the Government shown that the claim, as stated, is cognizable under the Extras clause, the Changes clause or any other clause contained in the contract; *nor has the Government shown that there are any facts in dispute which could confer jurisdiction* * * *." (Italics added by appellant; footnotes omitted.)

(Answer to Motion to Dismiss, p. 5).

Even when read literally, the underscored language in the above quote does not support the view that simply because there are facts in dispute the Board will assume jurisdiction. That was not the basis for retaining jurisdiction over some of the claims asserted in the *American Cement* case; nor are we aware of any such decisions by this Board. There are cases, of course, where hearings are held to resolve disputed factual questions where a finding favorable to one of the parties would provide a basis for granting relief. (*E.g.*, a claim filed under the Changes clause where the appellant asserts and the Government denies an order to accelerate performance was issues.)

[5] The guidelines are identified in appellant's opposition as an NPS Memorandum dated Jan. 10, 1974, furnished to all concessioners as the policy governing the establishment of electric rates from which the following is quoted:

"Subject: Restatement of policy and guidelines for establishing rates for utility services furnished to concessioners and other non-federal users.

* * * * * *

"3. The appraisal team must provide an opportunity for local participation by park management and the concessioners. Final rate determination will be made and discussed during the appraiser's field visit and will become effective subject only to appeal, through channels, to the Director."

(Answer to Motion to Dismiss, p. 2).

[6] The governing regulations are identified as 43 CFR 4.1(1) from which the following is quoted:

"(1) Board of Contract Appeals. The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions by contracting officers of any bureau or office of the Department, wherever situated, or any field installation thereof * * *."

(Answer to Motion to Dismiss, p. 3).

The foregoing jurisdictional requirements have not been modified as applied to this Appeal by the Contract Disputes Act of 1978 (41 U.S.C. §§ 601, *et seq.*; 92 Stat. 2383). The Contract Disputes Act applies by its terms only to procurement contracts and to contracts for the disposal of personal property (41 U.S.C. § 602). Contract No. NPS–WASO–IX–63–2 falls under neither of these categories. It is a concession contract, subject to the provisions of Public Law 89–249 (16 U.S.C. §§ 20 *et seq.*; 79 Stat. 969).

(Government Answer, p. 3).[7]

Decision

[1] It is undisputed that the contract in issue does not contain a Disputes clause. Review of the contract discloses that it does not contain a "Changes" clause, a "Differing Site Conditions" clause or any other provision for equitable adjustment. Even if the contract contained a Disputes clause, we would still be without jurisdiction in this matter where, as here, the contract fails to include an equitable adjustment provision.[8] Since the contract does not contain a Disputes clause[9] and since by its terms[10] the Contract Disputes Act of 1978 does not apply to the claim here asserted, the Board is without authority[11] to remedy the wrong alleged.[12] Accordingly, the appeal is dismissed.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

WE CONCUR:

DAVID DOANE,
Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

[7] Under the caption "Effective Date of Act." the Contract Disputes Act of 1978 (P.L. 95–563, 92 Stat. 2383, 2391) provides:

"Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter."

(41 U.S.C. § 601 note).

[8] *Placer County, Calif.*, IBCA–777–5–69 (Apr. 8, 1971), 78 I.D. 113, 71–1 BCA par. 8,801; *Toke Cleaners*, IBCA–1008–10–73 (May 10, 1974), 81 I.D. 258, 74–1 BCA par. 10,633; *Pirate's Cove Marina*, IBCA–1018–2–74 (Feb. 25, 1975), 75–1 BCA par. 11,109.

[9] See *Brent L. Sellick*, GSBCA No. 4912 (Apr. 26, 1978), 78–1 BCA par. 13,197; *Checker Van & Storage of Oakland, Inc.*, ASBCA No. 11,081 (Apr. 10, 1968), 68–1 BCA par. 6,991 at 32,330 ("Our jurisdiction is contractual and it is based on the provisions of the Disputes Clause. * * *").

[10] Note 7, *supra*. The claim involved here is not being asserted under a contract entered into on or after the effective date of Mar. 1, 1979. It was neither pending then before the contracting officer, nor was it initiated thereafter.

[11] In making the argument that the guidelines (note 5, *supra*) expressly provide for an appeal through channels to the Director and that other governing regulations (note 6, *supra*) make clear that such channels involve an appeal to this Board, the appellant appears to have overlooked the fact that it is the Secretary who is the head of the Department and for whom the Board acts in adjudicating contract disputes as fully and finally as he might. (See 43 CFR 4.1.) As evidenced by his signature on the copy of the contract attached to the Complaint, the then Director of the National Park Service signed the contract here in issue as the contracting officer.

[12] Since we are dismissing the claim for lack of jurisdiction, we express no opinion on the merits of the controversy. See *Cosmo Construction Co. v. United States*, 194 Ct. Cl. 559, 573 (1971) ("Incidental and gratuitous findings not relevant to a dispute over which the board had jurisdiction 'would have no finality whatsoever'."). (Footnote omitted.)

DEAN TRUCKING CO., INC.

1 IBSMA 105

Decided *March 23, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement from those parts of an initial decision by Administrative Law Judge Tom M. Allen (in Docket Nos. CH8–12–R and CH9–4–R), dated Nov. 28, 1978, vacating three notices of violation issued by appellant under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

The administrative law judge may frame findings of fact in any of a number of acceptable ways, but, however they are arrived at, findings must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor (Charleston), Michael Kurman, Esq., Office of the Solicitor, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, all for appellant Office of Surface Mining Reclamation and Enforcement; L. Thomas Galloway, Esq., and Richard L. Webb, Esq., of the Center for Law and Social Policy for intervenors Council of the Southern Mountains, Inc., The Environmental Policy Institute, and the Appalachian Coalition; and David R. Wooley, Esq., of Appalachian Research and Defense Fund, Inc., for intervenors The Tug Valley Recovery Center, Inc., and Save Our Mountains.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

Acting on the basis of a citizens' complaint, Office of Surface Mining Reclamation and Enforcement (OSM) Inspector Ronnie Vicars visited the Dean Trucking Company's (Dean) surface mining operation in Big Stone Gap, Virginia, on Aug. 3 and Aug. 10, 1978, for the purpose of conducting an inspection under the Surface Mining Control and Reclamation Act of 1977 (Act).[1] On the later date the inspector issued a violation notice (designated 78–I–18–3) charging Dean with three separate violations of the Act and its regulations—(1) failure to pass all mine drainage through a sedimentation pond; (2) failure to erect perimeter markers; and (3) improper construction of a valley fill. Ultimately Dean abated the first two alleged violations. However, Dean refused to accept the validity of the notice in respect of the alleged valley fill regulation violation (§ 715.15(b),

[1] Act of Aug. 3, 1977, P.L. 95–87, 91 Stat. 445.

42 FR 62683–4 (Dec. 13, 1977)), and the inspector returned on two occasions, Aug. 29 and Sept. 27, 1978, each time writing a separate notice for Dean's additional alleged violations of that regulation.

On Sept. 5, 1978, Dean filed an application for review of the three violations alleged in the August 10 notice as well as the violation charged in the August 29 notice. Later, Dean separately applied for review of the September notice, and OSM moved for consolidation of the three notices (five alleged violations) for purposes of the hearing. The Administrative Law Judge (Judge) granted that motion and convened a hearing on Oct. 24, 1978, to review all of the alleged violations.

At the hearing it became clear that there was no serious challenge to the alleged violations regarding failure to erect perimeter markers and failure to construct a sedimentation pond. Dean has not appealed the Judge's ruling in favor of OSM on these violations. Regarding the alleged valley fill regulations violations, however, Dean argued that in order to prove such violations OSM must show that the alleged offending structure is a valley or head-of-hollow fill as defined in sec. 710.5 of the regulations (42 FR 62678 (Dec. 13, 1977)), and that OSM did not do so. OSM failed, according to Dean, to prove that the questioned structure did "encroach upon or obstruct" a natural stream channel which proof is necessary before a structure will be deemed a fill for purposes of the regulation.

The first sally of Dean's attack was to contradict OSM's factual case by offering testimony of witnesses which disputed the testimony of OSM witnesses. OSM witnesses said that they could tell from what they saw in August and September that there had been a natural stream channel at the site before Dean began mining the area the previous year; Dean witnesses testified that there had never been a natural stream channel at that site during the entire course of their operations.

Dean's next assault was that even assuming that there had been a natural stream channel before Dean began its operation, there was no such channel when the Act and regulations became effective on May 3, 1978. According to this line of argument, Dean filled in the area before May 3 in accordance with the then-applicable law and permit conditions so that there no longer was any "natural stream channel" when the Act became effective. Thus, Dean argued that OSM could not prove the existence of the channel on May 3 and that therefore its spoil disposal operation was, both before and after May 3, within the confines of the law.

At the conclusion of the hearing a number of comments were made that contribute substantially to the action that will be taken by the Board. First, the Judge announced: "[Dean] constructed a valley fill without approval of the regulatory authority and not in compliance with section 715.15(b) * * *" (Tr. 150). Then, he stated:

> I believe that there were in fact violations, but I do not believe that all of the violations were of the type that would require any civil penalty, and I'm not

satisfied with remedial actions as [sic] least as to the hollow fill situation, and I wish to leave the record open for thirty days to provide the mine owner and OSM and the state authorities the opportunity to determine whether or not remedial means can be taken to eliminate the problem or problems in the future.

(Tr. 151).

Counsel for Dean then asked whether this was a final ruling. The Judge said it was not. Counsel replied that the reason he had inquired was to make certain his appeal time would not run. The Judge responded that that was why he said he would keep the record open. The hearing was then concluded upon the Judge's statement to counsel that "you are still invited to submit proposed findings of fact and conclusions of law" (Tr. 152).[2]

Over the next 30 days the parties met on various occasions but failed to agree on any remedial actions (letter of Nov. 20, 1978, from counsel for OSM to Administrative Law Judge). OSM also submitted proposed findings and conclusions.

In an opinion dated Nov. 28, 1978, the Judge, with his independent findings, vacated the notices on the ground that OSM "has not carried the burden of showing the existence of a violation under the Act or the interim regulations for reasons that the notice of violation specified 'construction of a valley fill' and the evidence does not establish the area as a valley" (Decision at p. 4).

On Dec. 11, 1978, OSM filed its notice of appeal from that decision. On Jan. 16, 1979, five organizations petitioned the Board for leave to intervene in the case.[3] By order dated Jan. 18, 1979, the Board granted the five leave to intervene in order to file a joint brief. Both OSM and the intervenors have now timely filed briefs. Dean has filed no brief.

Contentions on Appeal and Discussion

OSM and the intervenors argue that the holding of the Administrative Law Judge is erroneous, that his findings are inadequate, and that the Board should consider the matter de novo. Because the Board agrees that the findings are inadequate, it is not prepared to agree or disagree that the holding is incorrect. The Board declines to exercise any power it may have to consider matters de novo in an appeal where one of the parties is unrepresented.[4]

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[2] Previous to the foregoing quotations, the Judge had told counsel that they had the right to submit proposed findings along with a brief and argument. He stated his reluctance to rule from the bench and explained why. After the explanation, both counsel said they were prepared to take his ruling without briefing or argument. (Indeed, counsel for Dean said he had no intention to submit any brief (Tr. 146).)

[3] The organizations are Council of the Southern Mountains, Inc., The Environmental Policy Institute, The Appalachian Coalition, The Tug Valley Recovery Center, Inc., and Save Our Mountains.

[4] Some observations by the late Lon Fuller concerning judges and advocates might prove illuminating.

"The Lawyer's Role as Advocate in Open Court

* * * * *

"In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute

The Administrative Procedure Act requires that opinions rendered pursuant to it contain findings of fact and conclusions of law.[5] Although the decision of the Judge contains a heading entitled "Discussion, Findings of Fact, and Conclusions of Law," it is not possible to ascertain those essential, ultimate facts which formed the framework against which the appropriate law is to be applied. The transcript does

F N.4—Continued
without the aid of partisan advocacy. [Italics supplied.]

"Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

"It is small wonder, then, that failure generally attends the atempt to dispense with the distinct roles traditionally implied in adjudication. * * *

"* * * It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory : a public trial of the facts and issues. Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate. It is a part of his role to absorb these possible disappointments. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

* * * * *

"These, then, are the reasons for believing that partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society. But if we were to put all of these detailed considerations to one side, we should still be confronted by the fact that, in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.

"Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. * * *

"When advocacy is thus viewed, it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to a controversy, he distorts and obscures its true nature." L. L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 382–384 (1978); quoted section originally published as L. L. Fuller and J. D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

None of this is to indicate that either counsel was inadequate. Indeed, it is because the record indicates otherwise that we have chosen to bring up this important point at this time. Counsel for Dean told the administrative law judge that Dean was not going to submit proposed findings or a brief (Tr. 146). The court did not order but merely invited him to do so (Tr. 152). Dean, perhaps for reasons of economy, chose not to participate in an appeal brought by OSM. For that we cannot fault him, either. If our role were solely to pronounce a judgment which would affect only the parties, we would not be so troubled. But that is not the case. In addition to judging, we also explicate the existing policy of the Department. That explication has precedental value. For that reason alone, we require more than a "devil's advocate" from our own number to argue the other side. What we might state in Dean will create joy or sorrow in a variety of households that have an interest, not in Dean's particular business, but in the business of surface mining in general.

OSM has been represented from the beginning. Intervenors joined it at the appellate level and, essentially, supported the position of OSM. Nobody, party or intervenor, has represented the interest held by Dean before the Board.

Although the right to intervene is not automatic, we refer interested persons to the generous intervention provisions of the regulations governing participation before the Hearings Division and this Board (43 CFR 4.1110).

[5] 5 U.S.C. § 557 (1970).

not help either, for as was noted earlier, the Judge there indicated findings that are totally inconsistent with some that are indicated in the written opinion.

In remanding this case to the Hearings Division, the Board is not telling the Judge that there is only one way to arrive at and frame findings. There are many. But however findings are arrived at, they are the Judge's responsibility[6] and they must be sufficiently comprehensive and pertinent to form a basis for decision when measured against the evidence.[7]

Further, the Board is not limiting the Judge to drafting findings, nor does it intend to interfere with whatever power he possesses to reopen the record or reconsider the decision. The Board does require, at a minimum, that the findings indicate whether or not there was a valley or head-of-hollow on Aug. 2, 1977, and on May 3, 1978, and at any time after May 3, 1978, and whether such finding is based on the existence or nonexistence of evidence. If there was a valley or head-of-hollow on any of those dates, had it been filled and to what extent? Again, is that finding based on the existence or nonexistence of evidence? Also, does the Judge hold as a matter of law that a permit issued by the Commonwealth of Virginia before the passage of the Act allows conduct otherwise prohibited by the Act? And, if that is so, does the state permit supervene the Act?

In regard to the statement on p. 9 of the decision that OSM "has not carried the burden of showing the existence of a violation," is the Judge referring to the "burden" set forth in 43 CFR 4.1171, which provides that "OSM shall have the burden of going forward to establish a prima facie case" while "[t]he ultimate burden of persuasion shall rest with the applicant for review," or is some other "burden" being invoked?

ORDER

Therefore, it is hereby ordered that the above-captioned case is remanded to the Hearings Division for further action not inconsistent with this opinion.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

CHIEF ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I agree with what my colleagues have said and done in this case. I only want to add that what happened here is what troubled Mr. Justice Harlan in *United States* v. *El Paso Natural Gas Company* 376 U.S. 651, 663 (1964): "The real lack in this case is that the District Court wrote no opinion setting forth the reasoning underlying any of the subsidiary findings on dis-

[6] *See Hill & Range Songs, Inc.* v. *Fred Rose Music, Inc.*, 413 F. Supp. 967, 973 (M.D. Tenn. 1976); *aff'd*, 570 F. 2d 554 (6th Cir. 1978), for a complete listing of cases concerned with the "proper" way of preparing findings.

[7] *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82 (App. D.C. 1944).

puted issues of fact or connecting the subsidiary findings with its ultimate determination * * *."

WILL A. IRWIN,
Chief Administrative Judge.

APPEAL OF GENERAL CONSTRUCTION CORPORATION OF AMERICA BY FINANCIAL INDEMNITY CO., ITS SURETY

IBCA-1178-2-78

Decided *March 29, 1979*

Contract No. 14-16-0004-458, Fish and Wildlife Service.

Appeal Denied.

1. Rules of Practice: Appeals: Standing to Appeal

This Board approves the rule that a surety may prosecute and appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal, the principal contractor on the defaulted contract.

2. Contracts: Disputes and Remedies: Termination for Default: Generally—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Where the evidence shows no meeting of the minds between a completing surety and the Government on the matter of the surety's liability for liquidated damages, the Government does not waive the right to assess liquidated damages under a novation theory merely by allowing the surety, otherwise liable for liquidated damages under the contract, to complete performance of the contract terminated for default.

APPEARANCES: Mr. Ernest R. Drosdick, Attorney at Law, Lowndes, Drosdick & Doster, Orlando, Florida, for appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Factual and Procedural Background

On July 23, 1974, Contract No. 14-16-0004-458 was awarded by the Fish and Wildlife Service of the Department of the Interior (Government) to General Construction Corporation of America (contractor).[1] This was a construction contract executed on Standard Form 23 for the construction of an observation tower, a boat launching ramp, and parking facilities at the St. Marks National Wildlife Refuge, St. Marks, Florida. The contractor furnished a standard performance bond in the penal sum of $114,743 which was duly executed on behalf of Financial Indemnity Company (surety) as the corporate surety.

The contractor received written notice to proceed with the work on Aug. 19, 1974. Work was begun on or about Aug. 20, 1974. By letter

[1] In this opinion the following abbreviations shall have the meanings ascribed: AF means Appeal File; (AF, 21) means item 21 of the Appeal File; Tr. means Transcript; (Tr. 41) means Transcript at page 41.

dated Dec. 17, 1974, and received Dec. 24, 1974, the contractor informed the contracting officer of its financial inability to complete the contract and that the surety would do so with the surety's local agent in charge. Notice of termination for default was sent by letter to the contractor on Jan. 13, 1975, with a copy to the surety.

Although, both prior and subsequent to the notice of termination, considerable negotiations took place between the attorneys for the surety and the contracting officer in an attempt to accomplish a takeover agreement, none was ever consummated. However, the surety did, in fact, take over and did complete the contract on Sept. 30, 1975, without such an agreement. Completion occurred 99 days after June 23, 1975, the last day of the 308 calendar days of performance time allowed under the contract and change orders. The contract specified that liquidated damages were assessable against the contractor and its sureties at the rate of $100 per day for each calendar day of delay. As a consequence, the contracting officer assessed $9,900 liquidated damages against the surety.

In its claim to the contracting officer for relief from the assessment of liquidated damages, among other things, the surety argued: (1) that the delay was the fault of the Government because of its failure to promptly terminate the contract; and (2) that since there was no takeover agreement reached, as a matter of law the Government has no right to assess liquidated damages against the surety.[2] By his Findings of Fact and Decision the contracting officer reduced the assessment by 30 days, or $3,000, because of rainy weather. He rejected, however, the specific arguments set forth above and sustained the assessment of liquidated damages for 69 days, totaling $6,900.

An appeal from that decision by the surety in its own name ensued.

Issues Presented on Appeal

On appeal to the Board, the surety contends that it should be relieved from liquidated damages on three counts: (1) that for a 75–day period, from Oct. 31, 1974, to Jan. 13, 1975, the surety was ready, willing and able to take over performance of the contract, and but for the inordinate delay caused by the Government's failure to promptly terminate the contract, would have done so; (2) that because the contract provided that the work was to commence within 10 days after receipt of written notice

[2] We note, however, that the cases cited to the contracting officer to support the "matter of law" argument were old cases which construed a contract clause pertaining to termination for default and the matter of liquidated damages which is far different from the clause on those subjects contained in the 1969 revision of general contract form 23A which is pertinent to this case. Apparently this is the reason why the appellant, in his posthearing brief, switched from the "matter of law" theory to the "novation" theory, discussed *infra*.

to proceed, which was received on Aug. 19, 1974, the date for commencement of the computation of performance time should have been Aug. 29, 1974, and not Aug. 20, 1974, thus entitling surety to 10 days or $1,000 reduction in liquidated damages; and (3) that the provisions of the contract for assessment of liquidated damages are unenforceable against the surety because by allowing the surety to complete the work under the contract without a takeover, or completion, agreement, the Government waived the provisions for liquidated damages under the contract.

The Government, on the other hand, in addition to denying the allegations of the surety, contends on appeal that, as a matter of law pursuant to 41 U.S.C. § 256a (1976),[3] the Board is without jurisdiction to remit liquidated damages and that only the Comptroller General is empowered to do so under a Government contract. Also, at the hearing, the Government moved to dismiss on the ground that the appellant, Financial Indemnity, had no standing to prosecute this appeal under the rule laid down in *Sentry Insurance Co.*, ASBCA No. 21918 (Aug. 5, 1977), 77-2 BCA par. 12,721. Ruling on the motion was reserved at the hearing. Thereafter, the motion was renewed during the posthearing briefing period and subsequently ruled upon by an opinion and order of the Board, as more particularly hereafter discussed.

Decision

Although we reject the contentions of the Government with respect to jurisdiction and standing, we hold, for the reasons more particularly discussed below, that the appellant has not sustained its burden of proving excusability from the payment of liquidated damages required by the contract. We prefer to discuss first the issues of jurisdiction and standing.

Jurisdiction

By asserting the truism that the Board is without jurisdiction to remit liquidation damages,[4] the Government exposes a misconception of the theory of appellant's case. Although counsel for appellant did refer to the "remission" of liquidated damages in his brief, he is actually seeking relief from the assessment of liquidated damages.

[3] Sec. 256a of Title 41, United States Code, reads as follows:

"§ 256a. Waiver of liquidated damages.

"Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable. (Sept. 5, 1950, ch. 849, § 10(a), 65 Stat. 591.)"

[4] *See John Martin Co., Inc.*, IBCA-316 (Sept. 21, 1962), 1962 BCA par. 3,486; *Monarch Lumber Co.*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2,674; *Samuel N. Zarpas, Inc.*, IBCA-24 (Jan. 4, 1956), 63 I.D. 1, 6-7, 6 CCF par. 61,756.

In *Zarpas* the Board said: "Whether the contractor is entitled to the remission of liquidated damages involves equitable considerations which are not for the Board to consider, since it is not authorized to make recommendations to the Comptroller General with reference thereto."

In other words, appellant is contending that the assessment was wrongfully made, and wants that issue adjudicated on the merits.

One of the first cases to lay down the fundamental principle upon which a contractor may be relieved from liquidated damages was *United States* v. *United Engineering and Contracting Co.*, 234 U.S. 236, 243 (1914), where the Supreme Court quoted with approval the ruling of certain old English cases as follows:

> [W]here performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. * * * This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time.

If this Board were to sustain the Government's position that this appeal should be dismissed simply because the Board is without jurisdiction to remit liquidated damages, we would be closing our eyes to a vast body of public contract cases where this Board, other Boards, and the courts have granted relief to appellant contractors who have met the required criteria for the application of the modern doctrine of "excusable cause for delay." *See, e.g., Addison Construction Co.*, IBCA-1064-3-75 (Sept. 29, 1976), 83 I.D. 353, 76-2 BCA par. 12,118; *Globe Construction Co.*, ASBCA No. 13316 (Sept. 10, 1971), 71-2 BCA par. 9,123; and *Hirsch* v. *U.S.*, 94 Ct. Cl. 602 (1941). We refuse to ignore this firmly established doctrine and hold the Government's remission theory to be inapplicable to the facts of this case.

STANDING

[1] We disposed of the Government's second contention, that the surety was without standing to prosecute this appeal, by our order, dated Nov. 29, 1978. In that order we held that the surety, in compliance with *Sentry Insurance Co.*, *supra*, had furnished to this Board, within the 20 days allowed after adjournment of the hearing, an adequate written consent from the contractor permitting its representation by the surety in this appeal. We, therefore, denied the Government's motion to dismiss, but ordered that, since the surety did not enter into a takeover agreement, the style of this appeal must be changed to: "Appeal of General Construction Corporation of America, by Financial Indemnity Company, its Surety." We hereby reconfirm our approval of *Sentry Insurance Co.*, *supra*, which, as we stated in our opinion accompanying the aforesaid order, stands for the following proposition: A surety may prosecute an appeal in its own name when it enters into a takeover agreement to complete performance of a defaulted contract, but in the absence

of such an agreement, the surety may appeal under the defaulted contract only in a representative capacity with the consent of its principal, the principal contractor on the defaulted contract. *International Fidelity Insurance Co.*, AS BCA No. 22309 (Mar. 1, 1978), 78–1 BCA. par. 13,060.

We turn now to consideration of the specific claims of appellant.

Delay in Termination for Default

First, it is claimed that the Government wrongfully delayed, for a 75-day period, the termination of the contract after knowledge that the surety was ready, willing, and able to take over performance. At the hearing, the appellant called Mr. John H. Shugart, the contracting officer, as an adverse witness. His testimony included the following: that although the work performed by the contractor during the period from November 15 to December 15 was generally unsatisfactory (Tr. 17–19); and he knew, by virtue of a telephone conversation with an attorney for the surety on Nov. 11, 1974, that the surety wanted the contractor to be defaulted (Tr. 240), the inspection reports reflected, as of Nov. 15, 1974, that 49.4 percent of the work had been completed with only 28.5 percent of the completion time expired (Tr. 25); that this provided no basis for default (Tr. 25); that he received the notice from the contractor of its inability to perform on Dec. 24, 1974, and sent notice of termination on Jan. 13, 1975, which was not an unreasonable length of time (Tr. 43, 44).

Mr. Shugart was the only witness testifying at the hearing and appellant offered no other evidence to establish its contention of undue delay in terminating for default. This evidence is not sufficient to convince us that the Government wrongfully delayed the termination. Therefore, the first count of appellant's claim cannot be sustained.

Computation of Performance Time

Secondly, appellant claims that the assessment of liquidated damages should be reduced by $1,000 because the Government incorrectly computed the performance time. Appellant contends that since the contract provides that the work was to commence within 10 days after receipt of written notice to proceed, the Government erred in commencing to count the performance time on the first day after receipt, instead of 10 days after receipt of the notice to proceed.

At the hearing, the contracting officer testified that the notice to proceed was dated Aug. 14, 1974, was sent by certified mail and received by the contractor Aug. 19, 1974 (Tr. 46). This was verified by Item 6 of the Appeal File which was the notice to proceed. Item 1 of the Appeal File includes Standard Form 20, Invitation for Bids (Construction Contract), from which the following is quoted: "The undersigned agrees, if awarded the contract, to commence work within ten

(10) calendar days after the date of receipt of notice to proceed, and to complete the work within Two Hundred & Forty (240) calendar days after date of receipt of notice to proceed." Mr. Shugart explained (Tr. 27–49) that the purpose of the 10 days is to give the contractor time to mobilize, move on, and get the work started; that the contractors are well aware of this; and that the 10 days is allowed before the contractor is questioned regarding his progress or lack of progress.

The express language of the contract is unambiguous and clearly indicates that the 240–day completion time starts to run on the first day after receipt by the contractor of the Notice to Proceed.

Again appellant offers no other evidence except the adverse testimony of the contracting officer and cites no legal authority to support its position on the computation of the performance time. The appellant clearly has not sustained its burden of proof with regard to the second count.

Waiver of Liquidated Damages by Novation

For the third count in its complaint, appellant asserts that the provisions of the contract for assessment of liquidated damages are unenforceable against the surety as a result of a waiver of liquidated damages by Government in allowing the surety to complete the work under the contract without the execution of a completion agreement. In its brief (p. 8) appellant contends that the surety and the Government entered into an entirely new oral agreement which constituted a novation wherein the surety agreed to undertake the completion of the project and the Government agreed to pay over to the surety the undisbursed construction funds as work progressed. However, appellant contends (Brief, p. 9) that the assessment of liquidated damages was not contemplated by the oral agreement and not agreeable to the surety.

By way of affirmative defense in its answer, the Government alleges: (1) that the surety did proceed with the work, even though no takeover agreement was signed; (2) that the surety was not delayed by any action of the Government and received payments jointly with the contractor; (3) that under Federal Procurement Regulations § 1–18. 803–6(c), a decision on whether to enter into a takeover agreement with a surety lies within the discretion of the contracting officer; and (4) the rights and obligations of the surety when no takeover agreement is executed are the same as if one had been executed.

[2] We are not persuaded that the circumstances of this case fit into the required criteria for a novation. First of all, as appellant points out on page 9 of its brief, one of the elements required for a novation is a meeting of the minds.

As indicated above, the appellant admits there was no meeting of the minds with regard to the assessment of liquidated damages for delay, provided for in the contract, and we so find. Secondly, according to sec. 424, *Restatement of the Law of Contracts*, published by the American Law Institute, a novation is a contract that (a) discharges immediately a previous contractual duty or a duty to make compensation, and (b) creates a new contractual duty, and (c) includes as a party one who neither owed the previous duty nor was entitled to its performance. Here, appellant has not shown that any previous contractual duty with regard to completion of the project or the payment of liquidated damages was discharged by the oral agreement between the surety and the Government. Also, appellant has neither adduced evidence to prove nor provided the citation of legal authorities to support the proposition that the surety here was not a party owing a duty under the contract. As indicated in the Findings of Fact and Decision of the contracting officer (AF, 33), liquidated damages are provided for in paragraph 5 of the General Provisions of the contract, sec. 27 of the General Conditions and paragraph 5 of the Special Conditions, and taken together, not only authorize, but require the assessment of liquidated damages for failure to complete the work within the specified time. Sec. 27 of the General Conditions, an integral part of the contract, and entitled, "Liquidated Damages," reads in pertinent part as follows: "Whatever sums may be due ad [*sic*] liquidated damages may be deducted from payments due the Contractor or may be collected from his surety." [5]

We hold, therefore, that no novation has been established in the circumstances of this case and that appellant has failed to sustain its burden of showing entitlement to relief from the liquidated damages assessed. Accordingly, the appeal is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

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[5] Federal Procurement Regulation § 1–18.803–3, is entitled, "Effect of termination for default," and provides:

"If a contractor's right to proceed is terminated for default, the Government may take over and complete the work or cause it to be completed, and the contractor and his sureties shall be liable to the Government for any increased costs caused thereby. If the contract contains the clause set forth in § 1–8.709–1, the contractor and his sureties shall, in addition to increased costs in completing the work, be liable for liquidated damages if liquidated damages are provided in the contract, or for actual damages if liquidated damages are not so provided."

We note that the contract *does* contain the clause set forth in § 1–8.709–1. We also point out that paragraph 5 of the Special Conditions of the contract reads as follows: "*LIQUIDATED DAMAGES* (See Sec. 27 of General Conditions) *THE RATE OF LIQUIDATED DAMAGES* for failure to complete the Work within the Time Specified will be ONE-HUNDRED DOLLARS ($100.00) PER DAY FOR EACH CALENDAR DAY OF DELAY."

ESTATE OF HAROLD HUMPY

7 IBIA 118

Decided *March 29, 1979*

Appeal from an order denying petition for rehearing after hearing upon reopening.

Reversed.

1. Indian Probate: Divorce: Indian Custom: Generally

A divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department.

2. Indian Probate: Divorce: Indian Custom: Generally

The courts have recognized Indian-custom divorces so long as the Indians continue in tribal relations.

3. Indian Probate: Divorce: Indian Custom: Generally

In recognizing the validity of Indian-custom divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations.

4. Indian Probate: Divorce: Indian Custom: Generally

A divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage.

5. Indian Probate: Divorce: Indian Custom: Generally

The validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

APPEARANCES: Jack H. Robison, Esq., of Johnson and Olson, for appellant, Ethelyn Murphy Humpy; Theodore J. Schroeder, Esq., of Sinai, Ohlson, Schroeder and Specchio, for appellee, Lorraine Kizer.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Ethelyn Murphy Humpy, hereinafter referred to as appellant, through her attorney, Jack H. Robison of Johnson and Olson, has appealed Administrative Law Judge William E. Hammett's order of July 5, 1978, denying petition for rehearing after hearing upon reopening.

Harold Humpy, hereinafter referred to as the decedent, an unallotted Shoshone Indian of the Duck Valley Indian Reservation of Nevada, died intestate near Fort Hall, Idaho, on Mar. 3, 1972, possessed of trust property situated in the State of Idaho.

Hearings were held on Oct. 5, 1972, and Apr. 29, 1975, at Fort Hall, Idaho, and Stewart, Nevada, for the purpose of ascertaining the heirs at law of the decedent. Thereafter, on June 30, 1975, an Order Determining Heirs was issued wherein Lorraine Kizer, the appellee herein, was determined to be the decedent's daughter and his sole heir. On June 18, 1976, this Board affirmed the said order thus making such determination final for the Department (5 IBIA 132).

On Nov. 18, 1976, the appellant, through her attorney, Callis A. Caldwell, filed a Petition to Reopen alleging she was the surviving spouse of the decedent. The petition was granted and the matter heard in Pocatello, Idaho, on Apr. 7, 1977. From the evidence adduced at the hearing of Apr. 7, 1977, the judge on Apr. 19, 1978, issued an order wherein he, among other things, found the marriage between the decedent and the appellant had been terminated by an Indian-custom divorce and that the decedent died unmarried. Accordingly, he affirmed his Order Determining Heirs of June 30, 1975.

The appellant on June 16, 1978, petitioned the judge for a rehearing stating as basis therefor:

1. The finding of the administrative law judge that Harold and Ethelyn Humpy were divorced by an Indian custom is improper. The Indian custom relied upon by the administrative law judge has not been shown to apply to the tribe of which this husband and wife were members, nor has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

2. That the administrative law judge failed to apply State law governing the divorce of a nonmember Indian couple on the Fort Hall Indian Reservation. The circumstances of this case indicate it must be determined what law is applicable to nonmember Indians living on the Fort Hall Reservation. The decision of the administrative law judge failed to take into consideration the *Code of Federal Regulations* which the claimant asserts as the applicable law based upon review of the various sources of law which may apply.

The judge on July 5, 1978, denied the petition for the following reasons:

1. That Jack H. Robison, attorney for petitioner, was not an aggrieved party under 43 CFR 4.241 in that the petition did not have the signature of Ethelyn M. Humpy.

2. That the petition for rehearing did not raise any issues not raised by the evidence adduced at the hearing or in the posthearing brief filed by the petitioner.

Thereafter, on Sept. 1, 1978, the appellant filed a notice of appeal, It is the contention of the appellant that the administrative law judge's finding that Harold and Ethelyn Humpy were divorced by Indian custom is improper in that (1) the custom relied upon by the judge has not been shown to apply to the tribe of which this husband and wife were members nor (2) has it been shown that this custom applies to nonmember Indians living on the Fort Hall Indian Reservation.

Before addressing the appellant's contentions regarding her appeal, the matter of the appellee's motion to dismiss dated Oct. 6, 1978, requires consideration. The bases for the appellee's motion to dismiss are set forth as follows:

1. That the appellant, Ethelyn Humpy, was not, in fact, the real party in interest.

2. That appellant has not given her approval to the appeal in view of her whereabouts being unknown.

3. That the appeal is merely an expression of harassment by previous appellants, or their relatives, or their attorney.

4. That the notice of appeal allegedly filed by the appellant on Sept. 1, 1978, is signed only by her attorney thereby indicating lack of approval thereof by the appellant.

The motion to dismiss must be and is hereby denied in view of the affidavit, dated Oct. 16, 1978, filed by appellant's attorney evidencing the fact that appellant approved and authorized the notice of appeal dated Sept. 1, 1978, and that she is, in fact, the real party in interest. In addition, 43 CFR 4.291 authorizes a notice of appeal to be signed by an attorney.

From a review of the record and briefs filed by the parties the only issue to be resolved is whether the marriage between the decedent and the appellant was terminated by an Indian-custom divorce.

[1] There appears to be no question that a divorce in accordance with Indian or tribal custom has long been recognized by the Congress, the courts, and the Department. See *Estate of Noah Bredell*, 53 I.D. 78 (Apr. 12, 1930), and cases cited therein.

[2] Regarding such divorces, the courts have held that so long as the Indians continue in tribal relations, their domestic affairs are controlled by their peculiar customs. *Bredell, supra.*

[3] In recognizing the validity of such divorces, no distinction is made in the kind of marriage which such divorce dissolves so long as the parties contracting the marriage and effecting the divorce are Indian wards of the Government and living in tribal relations. *Bredell, supra.*

[4] Moreover, a divorce by Indian custom may be accomplished unilaterally by either of the parties to the marriage. *Estate of Hugh (William) Sloat*, IA-74 (Apr. 10, 1952).

[5] From the authorities hereinabove cited it is quite evident that the validity of Indian-custom divorce depends on whether the parties were living in tribal relations and whether it was an accepted and recognized custom of the tribe involved.

In the case at bar, the decedent, a Shoshone Indian of the Duck Valley Reservation, Nevada, purportedly married the appellant, a member of the Goshute Reservation, Utah, in 1951. The marriage, according to the record, was performed by a tribal judge of the Duck Valley Reservation in Owhyee, Nevada, in accordance with the Shoshone-Paiute Domestic Relations Code.[1] Subsequent thereto, the couple moved to the Fort Hall Reservation in the State

[1] Chapter 3—Domestic Relations, Sec. 2 *Marriage and Divorce.*

"All marriages shall be on authority of licenses, either tribal issued by the clerk of the Shoshone-Paiute Indian Court, or State issued by the County Clerk, and the ceremony shall be performed, in the case of a tribal license, by the Judge of the Shoshone-Paiute Indian Court, or in the case of a State license, by any person qualified by State law to perform such ceremonies, or in either case, by the Missionary."

of Idaho where they resided from 1952 until they separated in 1956.

The appellant's main contention, as we see it, is that Administrative Law Judge Hammett's finding that the decedent and the appellant were divorced by Indian custom was improper in that the custom relied upon by the judge has not been shown to apply to the tribe of which the parties were members.

The Shoshone–Paiute law and order code of the Duck Valley Reservation, Nevada, while setting forth how marriages are to be solemnized, makes no provision as to how marriages are to be terminated.[2] Moreover, a review of the record indicates the absence of evidence to substantiate an existing or recognized Indian custom regarding divorce on the Duck Valley Reservation. In fact, the evidence tends to indicate that divorce could only be effected through the courts. In the absence of a recognized Shoshone–Paiute tribal custom regarding divorce, it is rather difficult to support the judge's finding that the decedent's marriage to appellant had been terminated by an Indian–custom divorce. Presumably such finding may have been based on some theory of a universal Indian–custom divorce.

A review of *Bredell*, *supra*, and the authorities cited therein, indicates quite clearly that the validity and recognition of Indian– or tribal–custom divorces must be based on the custom and usage of each tribe involved. The right to designate the customs that are to be given recognition in regulating matters that affect the internal and social relations rests with each tribe as an incident of its sovereignty. *U.S.* v. *Mazurie*, 419 U.S. 544 (1975).

In the absence of a finding of an accepted or recognized Indian custom regarding divorce among the Shoshone—Paiute tribes of the Duck Valley Reservation, we hold that the decedent's marriage to the appellant could not have been terminated by tribal or Indian custom. Accordingly, as the surviving spouse, appellant is entitled to share in the decedent's estate. The judge's decision to the contrary must be reversed.

Since we are in agreement with the appellant's main contention that the judge's finding of an Indian–custom divorce was improper, we see no necessity for considering appellant's other contentions regarding the applicability of Indian custom and usage to nonmember Indians living on the Fort Hall Reservation.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order confirming Order Determining Heirs after Reopening, dated Apr. 19, 1978, issued by William E. Hammett, is hereby reversed and the matter is remanded to Judge Hammett for the purpose of entering an appropriate order to carry out the dictates of the Board as set forth herein.

[2] See Footnote 1, *supra*.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

WM. PHILIP HORTON,
Administrative Judge.

HENRY SAM LITTLEFIELD, JR.

7 IBIA 128

Decided *March 30, 1979*

Appeal from decision of Administrative Law Judge declaring that contestee was ineligible for enrollment under certain provisions of the Alaska Native Claims Settlement Act.

Reversed.

1. Alaska Native Claims Settlement Act: Disenrollment: Computation of Time for Filing and Service

Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day.

2. Alaska Native Claims Settlement Act: Enrollment: Metlakatla Natives

No person enrolled in the Metlakatla Indian Community of the Annette Islands Reserve as of Apr. 1, 1970, shall be eligible for enrollment under the Act.

3. Alaska Native Claims Settlement Act: Renunciation of Enrollment in Metlakatla Indian Community

The right of renunciation or expatriation is the natural and inherent right of the individual.

4. Alaska Native Claims Settlement Act: Renunciation of Enrollment in Metlakatla Indian Community

Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances."

APPEARANCES: Diane F. Thompson, Esq., Legal Services Program, Seattle Indian Center, Inc., Seattle, Washington, for appellants; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

The Enrollment Coordinator, Alaska Native Enrollment Office, Bureau of Indian Affairs, filed a complaint on Apr. 1, 1977, alleging that contestee Henry Sam Littlefield, Jr., was improperly enrolled under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act, Dec. 18, 1971, 85 Stat. 688 (43 U.S.C. § 1601 *et seq.* (1976)), and further that the contestee is enrolled as a

member of the Metlakatla Indian Community of Annette Islands Reserve.

The contestee applied for membership in the Metlakatla Indian Community on Aug. 9, 1958, and his application was accepted on Oct. 22, 1963. He married Carolyn Haldane on July 2, 1959, in Metlakatla, Alaska. They had two children. In October 1968, Carolyn Haldane Littlefield and the children left Metlakatla and went to live in Seattle, Washington. The contestee joined his family in Seattle in November 1968. The contestee lived with his family in Seattle from November 1968 to January 1970, then went to Los Angeles, California, where he stayed for 8 or 9 months. From Los Angeles the contestee went to Sitka, Alaska, where he stayed for approximately 1 year and thence returned to Seattle, Washington, where he remained until sometime after Thanksgiving 1972. The contestee returned to Metlakatla on or about December 1972 to visit his parents. He died at the Ketchikan General Hospital, Ketchikan, Alaska, on Jan. 5, 1973. Prior to his death and on May 10, 1972, Mr. Littlefield (contestee) applied for enrollment as an Alaskan Native and was subsequently enrolled.

On Apr. 4, 1977, the Enrollment Coordinator, Alaska Native Enrollment Office, Bureau of Indian Affairs, Anchorage, Alaska, filed a complaint with the Office of Hearings and Appeals, alleging in substance the contestee was not eligible for enrollment under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act, *supra*, because he was an enrolled member of the Metlakatla Indian community on Apr. 1, 1970. The matter was referred to Administrative Law Judge E. Kendall Clarke at Sacramento, California, for hearing.

After the hearing held on Nov. 29, 1977, Administrative Law Judge E. Kendall Clarke found on Sept. 8, 1978, that the contestee was enrolled in the Metlakatla Indian Community as of Apr. 1, 1970; that his continued absence did not result in the termination of his membership in said community until Nov. 1, 1970; and that therefore he was enrolled in the Metlakatla Indian Community as of Apr. 1, 1970. Judge Clarke concluded that the contestee was not eligible for enrollment under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act.

An appeal was filed on Oct. 10, 1978, with the Director, Office of Hearings and Appeals. Under authority of 43 CFR 4.1010 and 43 CFR 4.704, the Director ordered the Board of Indian Appeals to decide this case on an ad hoc basis.

The appellant contestee alleges that:

(1) The enrollment coordinator did not meet its burden of proof of showing that contestee was ever a member of the Metlakatla Indian Community.

(2) The administrative law judge was in error in concluding that contestee was a member of the Metlakatla Indian Community on Apr. 1, 1970.

(3) Even if the contestee had been a member of the Metlakatla Indian Community on Apr. 1, 1970, he was entitled to enrollment under the Alaska Native Claims Settlement Act if he was not a member of the Metlakatla Community on Dec. 18, 1971, the date on which the Act was passed by Congress.

(4) The administrative law judge was incorrect in concluding that membership in the Metlakatla Community on an alleged ineligible date subjects an individual automatically to disenrollment proceedings.

The appellee, enrollment coordinator alleges:

(1) The appeal was not timely filed.

(2) The appellant (contestee) was ineligible under the Alaska Native Claims Settlement Act because he was an enrolled member of the Metlakatla Indian Community on Apr. 1, 1970.

[1] Sec. 4.22(e) of Title 43 of the *Code of Federal Regulations* provides that:

> *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day * * *.

The record shows that Judge Clarke rendered his decision on Sept. 8, 1978, and that the appeal was received on Oct. 10, 1978.

Ordinarily Oct. 9, 1978, would have constituted the cutoff date for filing under Departmental regulations. However, October 9 was a Federal legal holiday (Columbus Day celebrated) making the end of the next day Oct. 10, 1978, the next business day, the cutoff date for filing an appeal.

We, therefore, find the appeal to have been timely filed.

Remaining is the issue of whether or not the contestee is entitled to enrollment under the Alaska Native Claims Settlement Act.

[2] At the outset we hold that membership in the Metlakatla Indian Community on Apr. 1, 1970, presents a bar to enrollment under the Alaska Native Claims Settlement Act. See P.L. 92-203, approved Dec. 18, 1971, sec. 5(b); 25 CFR 43h.11 (41 FR 32423 Aug. 3, 1976); *U.S.* v. *James Edward Scott & Robert Charles Scott*, Docket No. AL 77-135 D and AL 77-136 D, decided Dec. 4, 1978.

The Metlakatla Indian Community Constitution and By-Laws which was approved Aug. 23, 1944, provides in sec. 6, page 2, that "Continuous absence from Annette Islands Reserve for two years or longer, unless the member so absent shall notify the Council in writing, within such two year period, of his intention to return, shall constitute forfeiture of membership in the

Community. Such person may be readmitted to membership in the Community, as provided in Section 4 of this Article."

Were we to conclude that forfeiture is the only way to terminate a tribal relationship, the Board would be constrained to find the contestee ineligible for enrollment under the Alaska Native Claims Settlement Act since he was not absent from Metlakatla for a period of 2 years on Apr. 1, 1970.

[3, 4] However, forfeiture is not the only way that a tribal relationship may be terminated. As noted by the eminent Indian law scholar, Felix S. Cohen, an Indian may terminate a tribal relationship though renunciation of membership or expatriation.[1] Mr. Cohen states:

> It is of course recognized throughout the cases that tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses, although it has been said that such termination will not be inferred "from light and trifling circumstances." Handbook of Federal Indian Law by F. Cohen at p. 135.

An Indian's right to withdraw from tribal membership was upheld in *Reed* v. *U.S. National Bank of Portland*, 213 F. Supp. 919 (D. Ore. 1963). See also 42 CJS Indians § 10 (1978 Supp. at p. 155).

In the case at bar, the facts point to the conclusion that the contestee left Metlakatla in November 1968 with the intent to make Seattle, Washington, his permanent place of abode and his actual home or domicile.[2]

The contestee's family left Metlakatla in October 1968 and moved to Seattle, Washington. One month later the contestee followed his family to Seattle. The family continued to remain in Seattle, Washington. In or about January 1970 the contestee went to Los Angeles where he remained for 8 or 9 months. From Los Angeles he went to Sitka, Alaska, where he stayed for approximately 1 year and returned to Seattle, Washington, where his family was still living, and remained in Seattle until shortly after Thanksgiving 1972

[1] Cohen defines expatriation in Indian law as "the giving up of membership in a tribe." Handbook of Federal Indian Law at p. 177, n. 356. Historically, Cohen notes that the term was associated with the flight of oppressed Indians from belligerent tribes. See Handbook at 177–178 citing the landmark Federal case of *United States ex rel. Standing Bear* v. *Crook*, 25 Fed. Cas. No. 14891 (C.C. Neb. 1879). In his concluding analysis, however, Cohen observes:

"The right of expatriation established by the Standing Bear case remains a significant human right, even where Indian tribes are moving in an organized way toward the ideal of freedom from Indian Bureau supervision—It would be remarkable if the development of Indian self-government failed to give rise to dissatisfied individuals and minority groups who considered their tribal status a misfortune. History shows that nations lose in strength when they seek to prevent such unwitting subjects from renouncing allegiance." At p. 178.

[2] Sec. 43h.1(k) of Title 25, *Code of Federal Regulations* in part defines "permanent residence" as the place of domicile on Apr. 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home.

when he decided to go back to Metlakatla to visit his parents. He died on Jan. 5, 1973, at the Ketchikan General Hospital, Ketchikan, Alaska. At the time of his death the contestee was still married to Carolyn Haldane Littlefield and she and the family still resided in Seattle, Washington. Prior to his death, the contestee on May 10, 1972, applied for enrollment as an Alaska Native and was subsequently enrolled.

Based on the foregoing and other facts of record in this case, we hold that the contestee renounced his membership in the Metlakatla Indian Community prior to Apr. 1, 1970.

NOW, THEREFORE, by virtue of the authority delegated to the Board and pursuant to 43 CFR 4.704, IT IS HEREBY ORDERED that the determination made by Administrative Law Judge E. Kendall Clarke, to the effect that the contestee is not eligible for enrollment under secs. 3, 5, and 19 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.* (1976)) be, and the same is REVERSED.

IT IS FURTHER ORDERED and adjudged that the contestee Henry Sam Littlefield, Jr., is properly enrolled under the Alaska Native Claims Settlement Act and thus entitled to all benefits thereunder. The Bureau of Indian Affairs is directed, within 30 days of the issuance of this decision, to restore all benefits to which the contestee and/or his heirs at law may be entitled. This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

WM. PHILIP HORTON,
Administrative Judge.

ALEXANDER H. WILSON,
Chief Administrative Judge.

C & K COAL COMPANY

1 IBSMA 118

Decided *March 30, 1979*

Certification of an interlocutory ruling by Chief Administrative Law Judge Laurie K. Luoma (in Docket No. CH 9-11-P) dated Feb. 1, 1979, denying a motion to dismiss filed by the Office of Surface Mining Reclamation and Enforcement in a petition for review of a civil penalty proceeding under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

The filing of an application for review of a notice of violation does not suspend the running of the period within which a petition for review of a proposed assessment of a civil penalty must be filed.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor (Charleston), Michael Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, all for Respondent (Movant on Certification) Office of Surface Mining Reclamation and Enforcement; Bruno A. Muscatello, Esq., of Brydon and Stepanian, Butler, PA, for Applicant C & K Coal Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

This case presents a question certified to the Board from a proceeding to review a proposed civil penalty assessment under the Surface Mining Control and Reclamation Act of 1977 (Act).[1] The petition was filed by C & K Coal Company (C & K) on Dec. 18, 1978, and the proposed assessment was for three notices of violation issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to C & K on June 28, 1978. Earlier, on Nov. 17, 1978, Chief Administrative Law Judge Luoma (Judge) had issued a decision on C & K's application for review of the notices of violation themselves in which he affirmed two of the notices entirely and the third in part. On Jan. 8, 1979, C & K delivered to the Office of Hearings and Appeals a check in the amount of the proposed assessment to be placed in escrow, purportedly in accord with the regulations (42 FR 62704 (Dec. 13, 1977) (to be codified in 30 CFR 723.18)).

OSM filed an answer to the application on January 17 and simultaneously filed a motion to dismiss. The basis of the motion was that as C & K had not requested a conference (under sec. 723.17 of the interim regulations, 42 FR 62703–4 (Dec. 13, 1977)), it had to file its petition for review of the proposed assessment within 30 days of receipt thereof or be barred from complaining (according to sec. 518(c) of the Act). Since December 18 (the date the petition was filed) was far more than 30 days beyond service of the proposed assessment (July 29), C & K was said to have lost any entitlement it had to request a hearing on the assessment. The untimeliness of the request was worsened, according to OSM's motion, by the fact of even later delivery of the assessment amount into escrow.

On February 1, the Judge denied the motion on the grounds that the request was filed timely since it was filed within 30 days of the issuance of his decision on the application for review (apparently concluding that the review proceeding suspended the 30–day filing requirement for review of the assessment).

[1] The regulation covering certification is found at sec. 4.1124 of the procedural regulations (43 FR 34390 (Aug. 3, 1978) (to be codified in 43 CFR 4.1124)). Petitions for review of civil penalties are covered by part 723 of the interim regulations (42 FR 62702 (Dec. 13, 1977) (to be codified in 30 CFR Part 723)). The statutory basis for the regulations covering review of a civil penalty assessment is sec. 518 of the Act (Act of Aug. 3, 1977, P.L. 95–87, 91 Stat. 445, 499).

Regarding the time of filing the check, the Judge said that receipt of the check was merely a "procedural consideration" and that receipt of the check on January 8, "perfected" the pleading of December 18 (and apparently referred back to it) (Order of February 1, denying Motion to Dismiss).

OSM moved the Judge for certification of his ruling on February 27, and the Judge granted that motion on March 2. On March 6, the Board issued an order scheduling briefing for the two parties. Both filed an initial brief, but only C & K filed a reply brief. The Judge has scheduled a hearing on the petition for review of the proposed assessment for April 4.

Discussion

Our task is to search the applicable provisions of the interim regulations and Act. The governing regulation is sec. 723.18 (42 FR 62704 (Dec. 13, 1977)). It provides:

> (a) Within 30 days from receipt of the proposed assessment, the permittee may request a hearing before the Office of Hearings and Appeals by filing a petition and tendering full payment of the proposed assessment to be held in escrow.
>
> (b) The timely filing of a request for a conference under § 723.17 of this Part suspends the running of the 30-day period for requesting a hearing. The suspension shall continue until the completion of the conference, which shall be held within 60 days from the date of the request for the conference. The permittee shall have 15 days after completion of the conference or after any disapproval by the Director or his designee under § 723.17(e), whichever occurs later, to request a public hearing.
>
> (c) * * *

It is not necessary to consider the implications or ramifications of subparagraph (b) which provides for a suspension of the time specified in subparagraph (a). No request for the conference which triggers such a suspension was made by C & K.[2] Therefore, we are left with subparagraph (a)—not to construe, because its meaning is clear, but to determine whether there was compliance.[3]

Sec. 723.18 has two requirements which must be met for a hearing to be held on the amount of a proposed assessment:

(1) that the petition for a hearing be filed within 30 days from the receipt of the proposed assessment; and

(2) that full payment of the proposed assessment be tendered into escrow.

There is no authority for the proposition advanced by C & K that an application for review of a notice of violation itself suspends either of these requirements.

The record indicates that C & K failed both to petition for a hearing

[2] Sec. 723.17 of the interim regulations (42 FR 62703–4 (Dec. 13, 1977) (to be codified in 30 CFR 723.17)).

[3] Even if this language were not clear in itself, sec. 518(c) of the Act, which this regulation implements, requires that the person contesting "the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account * * *. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

within 30 days of its July 29 receipt of the proposed assessment (petition filed on Dec. 18, 1978) and to tender payment within that same 30–day period.[4] In fact, C & K did not even pay its money into escrow within 30 days of the Judge's November 17 decision affirming the notices of violation (payment into escrow on Jan. 8, 1979). OSM has raised these failures before the Hearings Division and this Board. The Board cannot ignore them.

We are not unmindful of the economic difficulties that might occur as a result of the application of the principle enunciated here.[5] However, the case as presented leaves no alternative. The Board finds the applicable law requires that the motion to dismiss filed by OSM on Jan. 17, 1979, should have been granted.

Therefore, the decision on the OSM Motion to Dismiss is reversed and the case is remanded to the Hearings Division for further action not inconsistent herewith.[6]

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

[4] Whether or not "tender" is synonymous with actual payment, it requires more than an undisclosed intention to pay up at some indefinite time. See *Kerr v. United States*, 108 F. 2d 585 (App. D.C. 1939.) All that C & K did within the time specified was to file an application for review of the violation under sec. 525 of the Act.

[5] Any modification of a regulation or the statute lies with the Secretary and the Congerss, not this Board. In that respect, whatever the reason, it is clear that Congress did not include sec. 518(c) of the Act by inadvertence or oversight. As originally introduced, the bill (H.R. 2) did not require the assessment be paid in order to preserve appeal rights. Sec. 518(c), as it now reads, is an amendment by the House Committee on Interior and Insular Affairs. Some discussion of why it might have been done may be found in S. Rep. No. 95–128, 95th Cong., 1st Sess., 58–59 (1977).

[6] The Board recognizes its holding appears dispositive of this matter. However, as the case came to us by way of certification of an interlocutory ruling, we are of the opinion that the best procedure is for us to remand to the Hearings Division for final, formal disposition.

DOCUMENTS

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